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VICTIMS AND THE CRIMINAL TRIAL

Tyrone Kirchengast

Palgrave Studies in Victims and Victimology

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Victims and the Criminal Trial

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Preface

This book brings together the diverse and fragmented rights and powers of victims constitutive of the modern adversarial criminal trial as found across the common law jurisdictions of the world. One characteristic of victim rights as they emerge within and constitute aspects of the modern criminal trial is that they are dispersed within an existing criminal process that largely identifies the offender as the benefactor of due process rights, originating in the seventeenth-century adversarial criminal trial. This trial increasingly excluded the victim for the Crown and state, and the role of the victim was slowly eroded to that of witness for the prosecution as the adversarial trial matured into the latter part of the twentieth century. Increasing awareness of the removal of the victim and the need to secure the rights and interests of victims as stakeholders of justice resulted in the last decade of the twentieth century, bearing witness to the gradual relocation of the victim in common law and statute. This relocation has occurred, however, in a highly fragmented and disconnected way, usually following spontaneous and at times ill thought-out law reform initiatives that may or may not connect to the spirit of existing reforms, foundational structures of the criminal process, or international or domestic rights frameworks that have emerged in the meantime.

The result of the emphasis on the victim is that the twenty-first century criminal trial is characterised by a fragmented range of rights and powers that affect normative criminal trial processes in varying, different,

and controversial ways in order to restore individual rights to victims. By interrogating the modern criminal trial on a procedural basis, this book sets out this framework as inherently fragmented and diverse. Put another way, it is impossible to tell the story of how the victim has been relocated into the modern criminal trial by explaining the range of rights and powers available to victims as manifesting from one, coherent framework. Rather, victim rights as they apply to and modify the criminal trial are informed by a range of diverse instruments—from international declarations and human rights norms to local policy for the management of at-risk groups and populations. Instead of corralling this diversity into a normalised process that attempts to tell how the victim participates in the modern criminal trial in a linear way, this book embraces the inherently diverse and at times incoherent range of victim rights and powers as they manifest across the criminal trial process, as the key and arguably defining characteristic of victims in the modern adversarial criminal trial.

As this book was being written, the Attorney-General of Victoria asked the Victorian Law Reform Commission (VLRC) to review and report on the role of victims in the criminal trial process. This reference is significant in terms of its breadth and coverage of the phases of the criminal trial. The terms of reference ask the VLRC to review and report on the common law origins of the criminal trial, comparative processes in civil law jurisdictions, recent innovations that affect victim participation in the trial process, the role of victims in the trial and sentencing process, compensation and restitution, and the need for victim support in relation to the criminal trial process. Although law reform bodies have considered the rights of victims previously, either in isolation or as relevant to the review of aspects of criminal law and procedure, few if any have had the opportunity to consider the role of the victim across the entire criminal justice system and trial process, with remit to make recommendations to redefine the way we characterise the criminal justice system as adversarial, or not. While the VLRC will produce its final report following publication of this book, the terms of reference indicate how the victim has emerged as a prominent stakeholder of justice in the adversarial trial context. Indeed, one can surmise that this reference alone establishes how victim rights and interests can be identified as a major site of law reform in the modern era.

There are several people to thank in the writing of this book. Mario Enio Rodrigues Jr. for his never-failing support; Thomas Crofts for his friendship and advice; and Murray Lee, Asher Flynn, and Mark Halsey for reminding me of the virtues of collegiality.

Sydney Tyrone Kirchengast

Contents

List of Abbreviations

A Crim R	Australian Criminal Reports
ABCA	Alberta Court of Appeal
AC	Appeal Cases
AAC	Administrative Appeals Chamber
ACHPR	African Commission on Human and Peoples' Rights
ACrHPR	African Charter on Human and Peoples' Rights
ACtJHR	African Court of Justice and Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
AHRC	African Human Rights Court
All ER	All England Law Reports
ALRC	Australian Law Reform Commission
BOCSAR	Bureau of Crime Statistics and Research (NSW)
CAAF	Court of Appeals for the Armed Forces
Can	Canada
CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CEU DVC	European Union, Directive of the European Parliament and of the Council (2012), 2012/29/EU, 25 October 2012, establishing minimum standards on the rights, support, and protection of victims of crime, and replacing council framework decision 2001/220/JHA.

CEU FD	European Union, European Council Framework Decision (2001) 2001/220/JHA, 15 March 2001, standing of victims in criminal proceedings
CIRCA	Cultural and Indigenous Research Centre Australia
CIS	Community Impact Statement
CLR	Commonwealth Law Reports
Cr App R	Criminal Appeal Reports
Cr App R(S)	Criminal Appeal Reports (Sentencing)
CVRA	Crime Victim Rights Act
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EU	European Union
EUECJ	Court of Justice of the European Communities
EWHC	High Court of England and Wales
F 2d	Federal Reporter, Second Series
F 3d	Federal Reporter, Third Series
F Supp	Federal Supplement
HCA	High Court of Australia
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
ICTR	International Criminal Tribunals for Rwanda
ICTY	International Criminal Tribunals for the former Yugoslavia
Ire	Ireland
LRCWA	Law Reform Commission of Western Australia
NATO	North Atlantic Treaty Organisation
NGO	Non-Government Organisation
NPS	National Probation Service
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal

NSWSC	Supreme Court of New South Wales
PJVC	The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
PwC	PricewaterhouseCoopers
QB	Queen's Bench Decisions
Qld	Queensland
QSC	Supreme Court of Queensland
RRRVGV	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
SA	South Australia
SASC	South Australia Supreme Court
Scot	Scotland
TIAS	Treaties and Other International Acts Series
UKUT	Upper Tribunal (Administrative Appeals Chamber)
UN	United Nations
UNESC Guideline	Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
USC	United States Code
UST	United States Treaty
Victims' Code	Code of Practice for Victims of Crime
VIC	Victoria
VIS	Victim Impact Statement
VLRC	Victorian Law Reform Commission
VPS	Victim Personal Statement
VSC	Supreme Court of Victoria
VSCA	Victorian Supreme Court of Appeal
WA	Western Australia
WDNC	Western District of North Carolina
WLR	Weekly Law Reports

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Victims of Crime Act 2001 (SA)
Victims' Rights and Support Act 2013 (NSW)
Victims Rights and Support Amendment (Transitional Claims) Regulation 2015 (NSW)
Victims Rights Bill 1996 (NSW)
Victims Support and Rehabilitation Act 1996 (NSW)
Victims' Charter Act 2006 (Vic)
Vulnerable Witnesses (Scotland) Act 2004 (Scot)
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Youth Justice and Criminal Evidence Act 1999 (UK)

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United Nations (1992), Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly, resolution GA/RES/47/133 of the General Assembly on 18 December 1992.

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Victims and the Criminal Trial Process

Introduction

The twenty-first century criminal trial is increasingly modified to benefit the needs of crime victims. Victims are increasingly participating in all phases of the criminal trial, with new substantive and procedural rights, many of which may be enforced against the state or defendant. This movement to enforceable rights has been controversial, and evidences a contested terrain between lawyers, defendants, policy-makers, and even victims themselves. By elaborating upon the various ways in which victims are appropriately placed in the modern criminal trial process, this book demonstrates how victims are significantly connected to and even constitutive of the modern adversarial criminal trial. In order to demonstrate the connectedness of the victim to the modern trial, all processes that seek to place the victim as a significantly determinative and even constitutive agent of justice will be considered. The role of the victim, and the rights and powers afforded to them, will therefore be considered in the context of pre-trial processes through to trial, sentencing, and corrections, within the primary context of the Western adversarial trial. Alternative pathways will also be considered, as will international law

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and procedure, in addition to extra-curial or adjunctive rights provided by international instruments, ratified declarations of rights, or executive order. The twenty-first century criminal trial is increasingly reconceived in form and substance, yet victims remain controversial and contested participants of justice, despite being increasingly connected to the criminal trial.

Not only are victim rights a matter of contestation for those stakeholders of justice normatively connected to processes of the criminal trial, defendants, the police, state prosecutors, and lawyers and the judiciary, but individual victims, victim groups and organisations, and the community, generally, are increasingly concerned with the shape and form that the criminal trial takes. Such modification is controversial given the long-standing rights of the accused to a fair trial without interference from victims, whether by individual victims, by rights groups, or by political process. The movement toward pre-emptive crime control, expanded police powers, alternatives to being put on trial, such as control orders and preventative detention, has led to the expansion of a law and order critique that holds the criminal trial as an institution that is increasingly vulnerable to rapid shifts in policy. Victims have been implicated in the general criticism expressed against changes to the criminal trial, despite always having been connected to criminal trial processes, even in the modern age of the state control and domination of criminal justice, where victims have been largely identified as residing at the periphery of criminal law and justice.

Although contentious, the expanded role of the victim in the criminal trial process is founded in law and policy that substantially underpins the functionality of the criminal trial (see Hall 2009; Doak 2008; Roach 1999a). Victims are and always have been substantially connected to process of policing, prosecution, evidence, sentencing, and corrections and this book demonstrates this through a consideration of the proliferation of ways in which victims increasingly take an active role in the modern criminal trial process. By confronting those criticisms that seek to silence victims, and place the trial within the control of those who claim to be normatively connected to it, this book demonstrates how the rights of victims are now not only integral to, but significantly constitutive of, the modern criminal trial in adversarial systems of justice.

The integration of the victim into the modern trial requires a broader approach than the popular conceptualisation of the criminal trial before judge and jury. A full contemplation of the significant role of the modern victim requires the consideration of broader sources of law and includes policy transfer and intervention, international law and practice, and the consideration of the continental European or civil law approach. These sources must also be read in the context of an increasing realisation that the normative basis of the Western adversarial trial involves more than the contestation of evidence between the state and the accused. Both common and civil law jurisdictions have demonstrated a tendency toward innovation to afford victims greater participation in all phases of the trial—from new police powers that centre the victim as a vulnerable party during investigation and arrest, to bail hearings and mentions, to new forms of evidence adduced before judge and jury, as well as increased victim participation in sentencing and parole. Rights frameworks that ratify international instruments by affording victims levels of fair treatment by justice professionals, access to information and advice, and limited advocacy and enforceable rights, also increasingly position the victim as a central proponent of the justice process (see Doak 2008). The alternative milieu of restorative pathways to justice, now increasingly accepted by courts as part of the established pre-trial and sentencing process in the lower courts of summary justice and increasingly in higher courts, also demonstrate an increased connectedness between victims, decision-making, and substantive court processes (Wemmers 2009).

By focusing on the stages of the trial, prosecutorial decision-making process, victim rights frameworks, enforceable declarations of rights, and alternative pathways to justice, this book provides detailed analysis of the main innovations that integrate the victim into the criminal trial process in the twenty-first century. Cross-jurisdictional references between adversarial and inquisitorial systems demonstrate how traditional boundaries that separate victims from the trial process are being eroded and dismantled to grant victims of crime access to substantive, decision-making processes, increasingly grounding victim participation in a framework of enforceable rights and privileges. While these changes are substantial, the existing system of state offender party relations is preserved (see Hall 2009).

Understanding the emergence of enforceable victim rights in common and civil law jurisdictions against a background of international law and practice, increasingly aware of the rights of victims, is central to an understanding of the modern criminal trial. The modern criminal trial in Western systems of adversarial justice is now constituted in an internationalised context (Hall 2010). This internationalised context allows for the increased sharing of ideas and approaches to justice once excluded and incompatible with common law, adversarial systems. Increasingly, this rigidity and jurisdictional isolation is eroded by international rights frameworks that innovate the trial process, albeit controversially. This includes the movement toward victim participation in police investigation; duties owed to specific groups, such as domestic violence and sex offences victims; enforceable charters of rights; changes to bail; pre-trial discovery; prosecutorial decision-making processes, including the duty to consult, plea-deals, and bargaining; the new law of evidence, including testifying out-of-court and the protection of the vulnerable witness; the provision of private counsel in common law and civil jurisdictions; increased victim participation in parole and corrections; changes to compensation and support to better meet the immediate needs of victims and support for victims of serious violence following an offence; and restorative justice and intervention as a complement to the criminal trial.

The integration of the victim into adversarial systems of justice has tended to occur at the periphery of criminal law and procedure. Most common law jurisdictions began the process of reintegration in the 1960s and 1970s, insofar as broad-based compensation was made available for injuries consequent upon a range of criminal offences. Support services followed, providing victims with a range of welfare-based options that were largely supported by government, or rights based on not-for-profit movements, or later as combined in agency agreement. Access to counselling, medical treatment, and workplace support tended to be provided by the not-for-profits while court and witness support tended to be provided by the state (see Sebba 1982). The dynamic of who provided these services changed in the 1980s and 1990s as governments were keen to utilise not-for-profits to provide services otherwise funded by the state. The United Nations (UN) Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power by the General Assembly (PJVC),

on 29 November 1985, also provided for the restaging of crime victims, which influenced the emergence of declarations or charters of victim rights at the local level. While these tended to be declaratory and not enforceable, such charters did lead to the reconsideration of the plight of the victim and placed victims in a firmer public policy context. Indeed, by the advent of the twenty-first century, governments were addressing victims as the priority group (Hall 2009).

The repositioning of the victim in adversarial systems of justice emerged in three key ways. First, victims emerged as prominent protagonists in public policy debate in the 1960s and 1970s. This was facilitated by increased mobilisation of victims into grassroots movements. This resulted in greater service for victims provided by government and accompanied the rise of rights-based movements that offered complementary services. The right to compensation and criminal injuries schemes provided extra-curial rights in administrative law, although most schemes originally provided for compensation during the sentencing phase of the criminal trial.

The second development focussed on human rights and basic access to justice. These rights sought better levels of respect and treatment for victims, emphasising the need to raise service levels within justice systems as provided by the 1985 PJVC. These rights aimed to crystallise those powers and privileges that victims ought to enjoy as universal rights and as participants in the criminal justice system. Rights as provided under the 1985 PJVC were later ratified as unenforceable rights by some jurisdictions, albeit unevenly and inconsistently, throughout the 1990s. Some jurisdictions have yet to articulate a charter or declaration, while others are transforming theirs into enforceable rights, as below.

The third wave leading to the repositioning of victims has its roots in the changes inspired by a greater focus on rights in the 1990s but has more firmly come to bear in the twenty-first century. This wave sees the emergence of substantive and enforceable rights that provide victims a means of actual court participation with a view to impacting the outcomes of substantive decision-making processes. The first of these powers emerged in the form of victim impact statements (VIS), although not all VIS were initially tendered with the view that they would impact on the sentence of the offender, and grave concerns were raised by lawyers as to the efficacy of VIS pursuant to the requirements of fair justice to the accused.

Tests for offence seriousness were also introduced that required the court to consider the harm done to the victim. The next major development came by way of modifications to the law of evidence, principally with regard to protections offered to sex offences victims in the trial process.[1] These protections include alternative ways of testifying where victims are identified as a vulnerable witness, because of cognitive impairment or by reasons of immaturity, or otherwise due to intimidation by the accused or mode of examination in court. Protections were expanded from sexual offences initially, to all offences should cause be established.

The other and possibly most significant movement toward substantive victim rights occurred with the transition away from non-enforceable rights as provided under charters or declarations. This transition included the initially fragmented emergence of enforceable powers that either emerged through the repeal and re-enactment of non-enforceable charters as enforceable, or through the inclusion of enforceable rights under discrete legislative instruments. The emergence of Commissioners of Victim Rights in certain jurisdictions helped consolidate this movement toward enforceable rights by providing a statutory office that has the capacity to enforce aspects of the charter, by directing that documents be produced and by holding enquiries where certain rights may be infringed, usually by public officials such as the police, prosecutors, or corrections and parole. Where jurisdictions lack a Commissioner, victims may turn to private counsel to help enforce rights against the state or the accused, where permitted. The third wave also saw greater synergies between restorative and normative trial processes. Rather than be identified as an adjunct to the criminal trial, restorative processes, especially at the Magistrates' or Local Court level, are increasingly utilised as a means to determine liability or offence seriousness, and found with Forum or Circle sentencing, where victims meet offenders in a conference that determines sentence. Finally, the movement toward human rights under the European Convention on Human Rights, the jurisprudence of the Strasburg Court, the European Court of Human Rights (ECtHR), and Directives of the European Union (EU) as ratified by member states, demonstrates another significant movement toward enforceable rights, particularly in terms of procedural or evidential standards affecting victim participation in court, and the victims' right to review prosecution decisions not to proceed with a matter (cf. Groenhuijsen 2014).

While this book draws from the first two waves of victim rights as background, it focuses on the third wave of the development of victim rights in greater detail. It does this by assessing separately the impact of the modern iteration of victim rights as they have transitioned into enforceable rights. One characteristic of the emergence of enforceable rights in the twenty-first century is that they are fragmented, incomplete, and at times inconsistent against existing powers and processes. While this seems disparaging, this is arguably the result of the discrete and individual inclusion of victims into the criminal justice process to address micro instances of public policy concern. As such, rather than emerge as a universal, coherent response to the growing concern over victim rights and interests, the twenty-first century movement toward substantive and enforceable rights utilises discrete amendment of criminal trial processes, usually by way of ratification of human rights instruments, statutory amendment of crimes legislation, or court judgments interpreting specific powers or rules that reposition the victim. This means that it is not possible to articulate the movement toward enforceable victim rights, either within a jurisdiction or even more so internationally, as unified under one coherent instrument or approach. Indeed, one must embrace the fragmented nature of such rights as they seek to modify, often controversially, different aspects of established criminal trial processes. What results, however, is the recognition that the victim is now connected to and constitutive of the modern criminal trial in adversarial systems of justice in diverse ways. Furthermore, an understanding of the fragmented ways in which victims maintain this connection, from local policy transfer to the ratification of international instruments, is paramount to an understanding of the twenty-first century criminal trial as it operates as a modern institution of justice.

This book will draw from those jurisdictions with a strong record of incorporating the victim into the criminal trial. The common law counties of Australia, the USA, England and Wales, Ireland, Scotland, Canada, and New Zealand will be referred to, as will the civil law countries of Italy and France, with reference to Sweden, the Netherlands, and Germany. International law will also be utilised, mainly from the International Criminal Court (ICC) and the ECtHR.

Service, Procedural and Substantive Rights

The interrogation of the discourse of rights relevant to victims is itself an important consideration that underpins our understanding of the ways in which victims are now connected to criminal trial processes. Rights may be identified here as powers that require, allow, or mandate a form of treatment, benefit, protection, or privilege. To speak of different types of rights for defendants, for instance, may be to diminish the significance of the defendant's right to due process and procedural fairness, such that all powers conferred on the defendant, or their counsel, are of equal status insofar as they characterise the fair trial as identified in common law jurisprudence. However, the uneven relocation of the victim into criminal justice has required the use of different rights, or rather, rights that allow different levels of access to justice (see Doak et al. 2009). Although we increasingly see substantive rights for victims being debated and developed today, certain substantive rights may pre-date participatory rights. Similarly, nothing stops the legislature from developing new service level rights, albeit most jurisdictions are now moving away from policies that advocate non-enforceable rights alone.

The use of different rights for victims has allowed for the gradual integration of victims into criminal proceedings. This graduation has, arguably, been required by a legal establishment protecting the exclusive domain of the adversarial criminal trial and justice system. Victims themselves may also feel that a graduated integration into a rights discourse is appropriate, given their historic lack of affinity with justice processes. The history of the victim being displaced means that their reintegration has occurred through a range of mechanisms that have not afforded victims powers of universal application or outcome. Instead, the movement to provide victims greater rights and powers has occurred incrementally, responding to different periods of political rule that have sought to reposition the victim in different ways. The 1985 PJVC saw the first substantial movement toward declaratory or service level rights that sought a respectable level of treatment from public officials. Although an important milestone for victims given their otherwise unacknowledged or removed status, service level rights were and continue to be an important development. These rights allow for fair and respectable treatment,

to be listened to and be taken seriously, which encourages government to develop laws that enable victims to engage with the justice system generally. Some jurisdictions are still considering the ratification of a charter of rights inspired by the UN PJVC Declaration, although many have long moved to legislate such rights into law.

The 1990s saw the movement toward rights that allowed victims to participate in proceedings. Participatory rights are different from service level rights in that they grant the victim allocutory rights, or the right to speak and be heard in court. These rights may allow for direct participation but may not necessarily allow the victim to make submissions that affect decision-making processes. Participatory rights that provide for contact between police and prosecution, pursuant to prosecutorial guidelines, usually preclude the victim from influencing pre-trial decisions such as the charges brought against an accused, or plea-deals reached, or in sentencing, the victim recommending a particular punishment. Participatory rights that simultaneously limit substantive impact are often justified out of the importance of providing victims access to the justice process, to foster the potential therapeutic benefits of such participation, or because such participation appeases a political imperative of granting victims closer access to courts.

Certain participatory rights may, however, also provide for substantive input into decision-making processes. It is this latter development of victim rights with which this book is primarily focused, although the movement toward enforceable rights must be read in the historical context of the commitment to service and procedural rights and the tendency to draft service and procedural rights as providing an entitlement, where no such entitlement may be enforced at law. For instance, the *Code of Practice for Victims of Crime* (Victims' Code) is divided into two main sections for adult victims.[2] This includes clauses relating to (1) victims entitlements and (2) duties on service providers. Victims' Code, Chapter 2, Adult Victims, Part A: Victims' Entitlements provides rights to victims in their individual capacity as an injured person, as defined in the introduction to the Code. The Victims' Code also contains corollary duties for service providers under Chapter 2, Adult Victims, Part B: Duties on Service Providers. The rights are drafted as prescriptive, and there is an expectation that they will be applied and maintained. However, s34E of the

Domestic Violence, Crime and Victims Act 2004 (UK) provides against civil and criminal liability reducing the Victims' Code to service level rights alone, save where the Commissioner is empowered to resolve a dispute informally by mediating between interested parties, or where the Victims' Code is used in proceedings where there may be an expectation to follow the Code:

> s 34 Effect of non-compliance
>
> (1) If a person fails to perform a duty imposed on him by a code issued under section 32, the failure does not of itself make him liable to criminal or civil proceedings.
>
> (2) But the code is admissible in evidence in criminal or civil proceedings and a court may take into account a failure to comply with the code in determining a question in the proceedings.

Substantive rights generally emerged by making participatory rights enforceable. The ability to tender a VIS, as a key example of a widely utilised power to relocate the victim into criminal proceedings, grants participatory and substantive rights that can be enforced in court. Impact statements may be read to the court with a view that the content of the statement affects the sentence of the accused. Increasingly, however, victims are being granted substantive rights that allow for more than mere participation. Rights to information, consultation, or a modified trial process to protect vulnerable victims are key examples.

This book thus brings together the principal enforceable rights that allow the victim to make a substantive impact on decision-making in the pre-trial, trial, sentencing, and post-sentencing processes. Extra-curial rights not specifically associated with one phase of the criminal trial, but at as adjunctive rights for victims participating in criminal justice processes, are also included. Collectively, these rights and reforms to the trial process demonstrate how fragmented the integration of the victim has become. Despite this fragmentation, the inclusion of rights demonstrates the broader policy directive of the relocation of the victim as an important constituent of justice. This relocation modifies our understanding of the criminal trial such that without an adequate understanding of the rights of the victim and the impact of these on standard trial processes, one

cannot understand the context of the twenty-first century criminal trial in modern systems of adversarial justice.

Recent Developments and the Modern Criminal Trial

The response to calls for the better integration of victims into systems of criminal justice has resulted in a range of innovative programs and pilots seeking to reposition the victim. However, crime victims have tended to be managed away from the criminal trial into alternative pathways to justice in order to meet this policy directive. While innovation can be found at the periphery of criminal law and justice, through restorative justice, problem-solving and intervention programs that complement or work alongside normative trial processes, the twenty-first century is witness to the emergence of victim rights and powers that affect trial process in more direct ways. The modern criminal trial is constituted through a combination of discourses that manifest across various social, historical, and legal planes. The discourses that impact substantively on the form and function of the criminal trial include the historical underpinnings of the trial as an apparatus of individual, and then social and state control; the containment of the victim outside of the criminal process into the twentieth century; the increased role of international law and procedure and the growth of discourses of victim rights as human rights; policy transfer between common and civil law systems; and emergence of victim rights in a phase beyond service and procedural rights, arguably characterised as a new phase of enforceable rights that grant the victim substantive access to justice.

The emergence of enforceable rights for victims of crime that impact on normative trial processes substantially demonstrate how the twenty-first century criminal trial is increasingly repositioned to account for the rights of victims. It does this by considering new powers for victims that impact on decisions made in the pre-trial, trial, sentencing, and post-conviction phases of the criminal trial, in addition to extra-curial powers that lie beyond any one phase of the trial. Arguably, boundaries that once separated the victim from substantive participation in adversarial systems

of justice are now being eroded and dismantled in favour of rights and powers that can be enforced against the state or the accused, albeit in an unconventional, fragmented, and at times controversial way. Several themes intersect here to constitute the modern adversarial trial.

The History of the Criminal Trial and the Containment of Victim Rights

Victims were not always removed from the criminal trial. Prior to the assemblage of the institutional capacity of the Crown and early state to take over key aspects of the administration of justice the victim was essential. Victims were the police, prosecutor, and even punisher of offenders (see Kearon and Godfrey 2007). The various customary powers of the victim continue today as long-standing common law powers that constitute certain offices, now identified as public. Common law powers of the police constable, to pursue and apprehend felons; to arrest the suspect; to stand as common informant before a court, to inform a court of an offence; to bring and possibly withdraw an information or presentment; to call witnesses, at least initially in support of the prosecution; to present evidence at trial; and to make submissions or pleas in relation to sentencing and punishment, are functions originally traceable to early common law powers of victims. These are powers or rights that despite being long characterised as powers pertaining to processes of public prosecution, can be traced back to the early right of the victim to administer justice. Much of what shifted these powers has been identified by the rise of the Crown and early state out of an increased need to secure the realm and administer justice in favour of the peace, which mandated that powers once exercised by victims also be exercised by officials appointed by the sovereign or state. Importantly, these powers were not removed from the victim to be exercised by public officials alone. Rather, there was a gradual sharing of powers once possessed by the victim in favour of a growing need to secure the peace (Langbein 1978). Victims were complicit in this change, and even welcomed Crown and state officials in the administration of justice, given that crime control was always risky, dangerous, and costly. While the history here is extensive and comprehensive coverage is beyond this section, acknowledgment of

the origins of common law powers now constitutive of the various phases of the criminal trial supports the argument that there is nothing new, in a historical context, about the connectedness of the victim to the criminal trial (see generally, Langbein 2002).

What is new is the realisation that the victim has a clear connection to the administration of justice in the modern era. This is because the history of the criminal trial and criminal law justice more generally almost entirely omits the victim as an active participant. The accepted, dominant, and largely unchallenged narrative in common law systems positions the Crown and state as the rightful owner of criminal justice and all the powers and institutions that it includes. The dominance of this narrative is reinforced everywhere—the dominance of the Crown and state is presupposed in our law texts, in the expression of case references, in oaths of office, and in the insignia of our courts, to identify but a few indicia. The dominance the Crown and state is, however, best borne out through public officers that now constitute systems of justice in the modern era. Police and prosecution, the courts and corrections are now all identified as serving the public interest. All have an ambiguous relationship with victims. Victims must participate given their relevant connection to most criminal offences, but they are not trusted to inform decision-making in the interest of the community. More importantly, the dominance of the Crown and state excludes victims as relevant participants. Not only are victims excluded as irrelevant to the operation of justice, they are identified with scepticism, reviled as emotional and vindictive, and as incapable of rational, fair judgment. Such narratives filter our popular conscience of what constitutes criminal law and justice. This has led to the situation confronted by the early victim rights movements of the 1960s and 1970s, added to by the recognition of victim rights in the declarations of the 1980s.

We are now significantly removed from the position that emerged in the mid twentieth-century where victims were essentially derided with ridicule and scorn. While very significant inroads have been made for victims across various phases of the criminal trial, the dominance of the narrative that became widely accepted with the establishment of the adversarial trial remains. The rise of victim rights is still challenged as incompatible with institutions of public justice. The identification of these institutions as pro-

tecting the fairness of the trial and the rights of the accused to access justice is cited as the basis for the removal or containment of victim rights. What results is the development of an early victim rights discourse that places or houses victims in an administrative context away from the criminal trial. A key example is the provision of victim compensation as a mode of accessing justice that should not be conflated with the sentencing of the accused. Although initially determined at the time of sentencing, most common law jurisdictions removed compensation to an administrative milieu to provide victims their own space in which levels of compensation could be fairly determined. The containment of victim rights against the realisation that victims have rights in the trial context, as vulnerable witnesses for example, marks the first shifts to the substantive relocation of the victim in systems of criminal justice from the late 1970s.

The containment of the victim is, however, increasingly eroded and dismantled for processes and powers that reconnect victims to the phases of the modern criminal trial. The modern criminal trial identifies as following the third phase of victim rights, where inroads for victims were identified in terms of an emerging human rights discourse (Elias 1985; Garkawe 2004; van Dijk 2009: 20–23). The third wave of victim rights was said to benefit victims by overcoming the rhetoric of rights as something singularly identified with the standing of the accused. As such, Elias (1985) argued that this era of rights would call for the reconsideration of the identity of the victim not only as a participant of justice but as a subjective status more generally. The modern era of justice in the twenty-first century calls for the revisiting of this perspective, which is arguably identifiable as the era of the emergence of enforceable victim rights and trial processes. This era sees the realisation of the hope of the protagonists and authors of the third phase. Although aspects of the third phase are still arguably incomplete, in that human rights discourses are yet to fully realise the victim across all aspects of justice, the modern era of the dismantling of the administrative and legal structures that once contained the victim and sanitised the victim from the criminal trial are progressively eroding for the institutionalisation of victim rights and powers that grant the victim substantive standing in justice processes.

This movement away from containment has occurred in light of several important realisations. These include the critique of normative discourse,

the power of international law and process as a mechanism for change, and the willingness to experiment with and propose novel policy initiatives to recognise the interconnectedness of the victim and the criminal law. These factors of change, demonstrated through the transformative status of international law and procedure, are covered in the sections below, and will be drawn from across the remaining chapters of this book out of their relevance to various stages of the placement of the victim in the modern criminal trial.

International Law and Procedure

Victim rights to justice under international law have been progressively informed by a range of international declarations, instruments, ad hoc courts, tribunals, and panels. These have been established by the UN and other bodies seeking to investigate gross violations of human rights. Additionally, state-based courts and instruments have been formed to address regional human rights abuses, as have international courts seeking redress for international violations, leading to the establishment of the ICC. The movement to articulate the rights of victims in a criminal procedure that provides victims some active right of self-determination in proceedings positions international law and procedure as significantly determinative in the modern development of rights for victims (see Moffett 2014; Fernández de Casadevante Romani 2012; Ochoa 2013). The ratification of international law on a domestic basis has seen the development of localised approaches to victim rights first articulated in international law. International human rights discourse also filters to the local level not only of member states but of other jurisdictions by influencing policy approaches and interventions by way of processes of policy transfer (see McFarlane and Canton 2014; Dolowitz and Marsh 2002).

This section traces the rise of victim rights in international law and human rights discourse. The following chapters will demonstrate how this discourse has been integrated on the domestic level in terms of reform of the rules of criminal procedure and evidence as they characterise the adversarial criminal trial. The influence of international law and procedure may be clearly demonstrable where member states allow

domestic courts to refer to decision of human rights courts, declarations, or frameworks. The influence of international law and procedure may be more difficult to map where a state is not a signatory, and where domestic courts are unable to utilise international human rights decisions in an authoritative way, but where change is influenced by policy transfer.

United Nations Declarations and Treaty Monitoring Bodies

Although fragmented and incomplete, the integration and development of new approaches to the application of victim rights on a local level follows many of the conventions first enumerated in universal declarations such as the 1985 PJVC. This was followed by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by the UN Commission on Human Rights and by the UN General Assembly in 2005 (RRRVGV). The 1985 and 2005 UN Declarations provide a basis for the reconsideration of the importance of victims in the administration of justice generally. These declarations encouraged member states to reconsider the rights afforded to victims in the administration of justice by setting out fundamental rights to justice, redress for wrongdoing, and access to compensation. The 1985 PJVC was the first international instrument to grant victim rights to access justice and for the provision of appropriate mechanisms of support. The 2005 RRRVGV focussed on the duties of the state to investigate violations of human rights under international humanitarian law, and to bring perpetrators to justice by encouraging member states to meet their obligations to investigate violations. Further, the declaration sought to provide victims with remedies and reparation for the injuries suffered, and to encourage member states to determine the 'truth' of the violation.

Together, the 1985 PJVC and 2005 RRRVGV UN Declarations have the capacity to significantly influence domestic law and policy, and some states have gone as far as to ratify these rights or versions of similar substance and form under a charter or declaration of victims' rights.[3] The tendency has been to ratify these rights to encourage the administrators of justice, the police, prosecutions, courts (although not the judiciary) to

treat victims in a fair and professional way, by respecting the dignity of the victim. Later amendments included the right to access information and be kept informed of proceedings, and some jurisdictions are now moving toward declarations of enforceable rights, by providing victims the right to consult with the public prosecutor or state attorney regarding charge decision-making and plea-deals.[4] The significance of the 1985 PJVC and 2005 RRRVGV UN Declarations is that they encouraged a focus on the victim as a normative response of member states. This positioned victims in local politics and debates about criminal justice, and the extent to which victims ought to be provided meaningful rights of any sort. While victims were largely granted service level or procedural rights not enforceable against the state or accused, the ratification of the 1985 PJVC and 2005 RRRVGV UN Declarations did set out a policy framework that could be expanded upon. This framework has been further expanded upon by the UN by reference to discrete groups of victims, including child victims.

The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime by the UN Economic and Social Council in 2005 (UNESC Guideline) provides a basis for the protection of the interests of children who are victims of or witnesses to crime. The 2005 UNESC Guidelines are to be applied without reference to complicit conduct on the part of the victim, where a victim may be part of a larger criminal enterprise or group. The 2005 UNESC Guidelines seek to protect the dignity of child victims to ensure that they are treated with compassion and without discrimination, such that child victims also be afforded rights granted to adult victims, specifically the right to information on relevant judicial processes, to be heard and to express views and concerns on that process, to be granted effective assistance in preparation of any case or for court attendance. The rights to privacy, safety, and reparation are also granted.

Other declarations of the UN General Assembly require the state to exercise the universal jurisdiction granted for protection of certain victim rights. The Declaration on the Protection of All Persons from Enforced Disappearance by the UN General Assembly in 1992, and later the International Convention on the Protection of All Persons from Enforced Disappearance by the UN General Assembly in 2006, provide a universal

jurisdiction to be exercised by a state party where a suspect is present within the jurisdiction of the state party. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of the UN General Assembly in 1984 provides a universal power exercisable by member states where the suspect is not extradited. The four Geneva Conventions (1864–1949) and amending protocols, the final tribunal for which is the UN Security Council (UNSC), further oblige member states by requiring those states to search for persons or alleged offenders who may have committed or ordered to be committed grave breaches of the Conventions, and to turn such parties over to another member state as long as a prima facie case is made out.

The UN has also established a number of treaty monitoring bodies to check state compliance with human rights frameworks and conventions. In certain instances, these treaty monitoring bodies may receive complains from individual victims. For example, the Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR); the Committee on the Elimination of Racial Discrimination monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Committee Against Torture monitors the implementation of the 1984 UN CAT; the Committee on the Elimination of All Forms of Discrimination Against Women monitors the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); and the Committee on the Rights of Persons with Disabilities monitors the implementation of the International Convention on the Rights of Persons with Disabilities (ICRPD).

Ad Hoc Courts and Tribunals

Although victims were initially afforded few rights of participation to be involved in substantive decision-making processes in ad hoc tribunals, the first tribunals did set up a system of international law and procedure for

gross violations of human rights that led to the extension of these rights to victims. It was these tribunals that provided a space for the further articulation of the rights of victims removed from the strictures of nationalised systems of criminal justice.

The Nuremberg and Tokyo Tribunals, established after the Second World War, and the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and International Criminal Tribunals for Rwanda (ICTR), established a forum through which violations of human rights could be investigated and prosecuted (see Bassiouni 2006: 209–210). A victim was defined under the Rules of Procedure and Evidence of both tribunals, and included 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'. The term 'against' essentially precluded any person who suffered a consequence of the violation of a human right, but were not directly targeted. This meant that many injured parties were excluded through the terms of reference and the rules adopted. Furthermore, although these international tribunals provided a stage for the determination of gross violations of human rights, they did not accord the victim any significant level of rights or powers regarding participation or substantive decision-making, other than to appear as witness. However, the Rules of Procedure and Evidence did provide for witness support, and for their protection, especially where they presented as a vulnerable witness in fear of reprisal or retaliation. Psychological and physical rehabilitation, especially for victims of sexual assault, was also provided. Despite a lack of direct participatory or substantive victim control, the ICTY and ICTR did provide the stage upon which an expanded role of the victim could be further contemplated (see Knoops 2014).

Regional Declarations, Courts, and Tribunals

The Council of Ministers of the Council of Europe issued a recommendation on the position of victims in criminal law and procedure in 1985, requesting that victim needs be taken into account at all stages of criminal proceedings on a domestic level. The aim of the recommendation was to foster legal and policy development amongst European states as to the

ratification of a criminal procedure that provided victims with rights to information, to challenge a decision of the prosecution not to prosecute or to withdraw a charge, to bring a private prosecution, and to allow victims a universal right to compensation following a crime. In 2001, the Council of the European Union adopted the Framework Decision on the Standing of Victims in Criminal Proceedings (2001 CEU FD) similarly advising member states to grant victims a role in the criminal justice system by providing victims with assistance in the investigative and trial phases, and following conviction. The 2001 CEU FD was superseded in 2012 by the Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime (2012 CEU DVC), following exposure of a draft instrument in 2011 (2011 CEU DD).

The 2012 CEU DVC provided a further foundation for the provision of victim rights in the criminal procedure of member states. The 2012 CEU DVC sets out provisions in similar terms to the 2001 CEU FD but further clarifies rights and provisions developed since 2001 by emphasising the relevance of wrongdoing on the basis of gender or gender identity, crimes against women, domestic and partner violence, mutual recognition of protected measures, victimisation, and terrorism, in addition to a range of minimum standards for service provision such as reporting to the police, to access information and assistance, for redress, remedy, or reparation, and for the suitability of restorative justice as an alternative pathway to justice. Clause 20 of the preamble addresses the procedural aspects of the ratification of the Directive into the justice systems of member states:

> The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply

> to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system. (cl. 20 Preamble 2012 CEU DVC)

The Council of Europe adopted the European Convention of Human Rights (ECHR) in 1950, with the charter coming into effect in 1953. The ECtHR began operating as the main dispute resolution body for the ECHR in 1998, following the merger of the European Commission of Human Rights with the new ECtHR. States that are party to the ECHR may refer complaints under the ECHR to the ECtHR for resolution, as can individuals and non-government entities. Direct and indirect victims may submit a claim to the ECtHR. This essentially means primary victims and the relatives of the primary victim, or those who face a significant risk of being directly affected, may submit a claim for resolution. Victims will generally need to exhaust their matter for resolution in the member state, that is, pursue civil or criminal litigation through to final appeal through the state courts, prior to raising it with the ECtHR. In *Berger v France* (2002) ECHR 48221/99, the ECtHR applied the principle of equality of arms to determine that the victim participating as partie civile was independent from the other participants of the state and defendant. Although proceedings before the ECtHR are conducted with a view to adversarial argument and exchange, this process may be modified to accommodate the partie civile as maintaining the victim's right to express their interests alongside those of the state and defendant. In *Berger v France* (2002) ECHR 48221/99 the court held at par [38]:

> Having regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution, the Court cannot accept that the equality-of-arms principle has been infringed in the instant case. In that connection the Court agrees with the Government that a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.

The victim is therefore granted rights of participation at levels considerably greater than would otherwise be possible within an adversarial or common law court.[5] Victims may seek discovery of documents and

other relevant evidence in the ECtHR's registry. A lawyer acting for a victim may make submissions during hearings. The ECtHR will determine whether a violation of the ECHR has occurred or not, and may make limited reparations and award costs. The decisions of the ECtHR bind member states and the Council of Europe will see to the execution of decisions by seeking to stop present or future violations. This process may see further investigations where the judgment of the court raises new matters for consideration, such as war crimes or gross violations of human rights.

In the Americas, the Inter-American Commission of Human Rights ('IACHR') has the ability to hear complaints from individuals and states from two human rights instruments, the American Declaration of the Rights and Duties of Man 1948 (ADRDM) and the American Convention on Human Rights (ACHR). Matters referred to the Inter-American Court for Human Rights (IACtHR) from the ADRDM are final and may not be appealed to the court. The findings of the IACHR are not binding but are persuasive, and may be used as precedent by other courts. States wishing to pursue a matter before the IACHR must declare, together with the opposing state, that the IACHR has relevant jurisdiction to hear the complaint made by both parties. The IACHR may determine violations and make recommendations under the ADRDM and ACHR. The IACtHR may hear matters referred to it under the ACHR where a state accepts jurisdiction of the court. The IACtHR may take submissions from individual victims, their kin, or lawyers at all stages. Progressively over the last 15 years the IACtHR has allowed increased victim involvement and now considers that such involvement does not detract from the defence's right to make submissions in proceedings (Shelton 1994). The remedies available to the court include orders seeking to end a particular violation, compensation, or restitution, acts of rehabilitation, and even the erecting of monuments or effigies acknowledging victims. The IACtHR reports to the UN General Assembly and includes details of judgments and orders made, including those not complied with.

The African Commission on Human and Peoples' Rights (ACHPR) is responsible for implementing the African Charter on Human and Peoples' Rights (ACrHPR). In 1998, the African Court on Human and Peoples' Rights (ACtHPR) was established but its implementation was postponed

until a merger with the African Human Rights Court (AHRC) was complete, leading to the establishment of the African Court of Justice and Human Rights (ACtJHR). Persons other than state parties may submit complaints under the ACHPR, which may then be heard by the ACHPR on its own motion. Victims therefore do not possess the right to submit a complaint and have it heard as a matter of process. The ACHPR cannot grant remedies and has been criticised for inconsistent decision-making and for not offering an enforcement mechanism following decisions. The ACtJHR may hear a case following a submission from the ACHPR, a state member as complainant or defendant before the ACHPR, including a state member alleging violation against an individual citizen, or an intergovernmental organisation. An individual or intergovernmental organisation may bypass the ACHPR as long as the state member has made a declaration to accept the jurisdiction of the ACtJHR. Decisions are binding, and may include orders for compensation and reparation, and are not subject to appeal.

International Courts and Tribunals

To a limited extent, the Civil Claims Alien Tort Claims Act (28 USC § 1350) allows non-US citizens to pursue a claim against those on US Territory for gross violations of their human rights against a law or treaty recognised by the USA. The claim may be raised in tort only and may only succeed where the claimant can demonstrate before the Federal District Court that they have been subject to a violation of a universally accepted norm of international human rights law within US borders. The process may be served by someone alien to the US, that is, a non-US citizen (see Lai 2005).

The Special Court for Sierra Leone is a court independent from the national justice system of Sierra Leone, constituted through rules of procedure and evidence similar to those of the ICTY and ICTR. The court was created by agreement between the UN and the government of Sierra Leone, to prosecute those with responsibility for violations of international human rights law as well as the domestic laws of the country. Consistent with the Rules for Procedure and Evidence adopted in the ICTY and ICTR, the victim did not obtain a direct right of participation. However, the enabling statute constituting the Special Court for

Sierra Leone provided that the fairness to be accorded to the accused be mediated against the protection of victims and witnesses (Frulli 2000). Accordingly, the rules of court provided that victims and witnesses be accorded support and counselling, including opportunities for rehabilitation, especially for particularly vulnerable victims and witnesses such as children or sex offences victims. The Special Court for Sierra Leone followed the ICC by providing a Victims and Witness Support Unit for the delivery of these measures to victims.

The Extraordinary Chambers in the Courts of Cambodia are domestic courts that operate according to the principles of international law. The Extraordinary Chambers were established by agreement with the UN and the government of Cambodia and were ratified in domestic law. Accordingly, the Extraordinary Chambers became part of the domestic court structure of Cambodia, and operated according to Cambodian law, unlike other courts constituted under international law administered by the UN. The Extraordinary Chambers were constituted in 2006 in order to prosecute senior leaders of the Khmer Rouge who bore responsibility for human rights violations in Kampuchea between 1975 and 1979. The instruments establishing the Extraordinary Chambers gave significant powers to victims otherwise unprecedented under Cambodian law. This included the right to attend proceedings as witness, complainant, or parties civiles. Existing Cambodian criminal procedure only allowed victims the power to make a complaint, but not become the complainant, a role reserved for the police and prosecution. However, adopting the international law standards of partie civile allowed Cambodian victims to initiate proceedings where the prosecutor had chosen not to, or to act alongside the prosecution where a matter is initiated by the state (as to issues of comprehensive treatment of victims, see Killean 2015). Victims acting as partie civile thus have access to the case file and evidence, and may force an investigation where the state has demonstrated a lack of willingness to do so. The relevant provisions are set out under the Internal Rules (revised 16 January 2015), and rule 23(3) provides:

> At the pre-trial stage, Civil Parties participate individually. Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers as

described in IR 12 *ter*. The Civil Party Lead Co-Lawyers are supported by the Civil Party Lawyers described in IR 12 *ter* (3). Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations.

In order to participate as a partie civile, the Internal Rules 23 *bis*. (1) requires:

> In order for Civil Party action to be admissible, the Civil Party applicant shall:
>
> a) be clearly identified; and
> b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

Victims may thus present separately at the investigative phase. However, once the matter moves to the trial phase, victims must be represented by counsel as a consolidated group in order to facilitate the functionality of the court. Victims also have the power to appeal decisions from the trial chamber. Rights of appeal are provided pursuant to Internal Rules, rule 105(1)(c):

> The Civil Parties may appeal the decision on reparations. Where the Co-Prosecutors have appealed, the Civil Parties may appeal the verdict. They may not appeal the sentence.

The Internal Rules also provide for a Victim Support Section charged with the coordination of services to assist victims with partie civile claims. Rule 12 *bis*. (1) provides that:

> The Victims Support Section shall:
>
> a) Under the supervision of the Co-Prosecutors, assist Victims in lodging complaints;
> b) Under the supervision of the Co-Investigating Judges, assist victims in submitting Civil Party applications;

c) Maintain a list of foreign and national lawyers registered with the BAKC who wish to represent Victims or Victims' Associations before the ECCC;
d) Receive, verify and translate applications by foreign lawyers to represent Civil Parties before the ECCC and forward completed applications to BAKC for registration in accordance with the procedure determined by BAKC after consultation with the Victims Support Section;
e) Administer applications for admission to the list of Victims' Associations approved to act on behalf of Civil Parties before the ECCC, pursuant to the criteria set out in Rule 23 *quater*, and maintain a list of Victims' Associations so approved;
f) Provide general information to victims, especially Civil Parties;
g) Under the supervision of the Co-Investigating Judges or the Pre-Trial Chamber, as appropriate, present the above mentioned lists of, and information on, lawyers and Victims Associations to Victims or Civil Parties and facilitate legal representation as described in Rule 23;
h) Assist and support Civil Party and complainants' attendance in court proceedings;
i) In consultation with the Civil Party Lead Co-Lawyers and the Public Affairs Section, where appropriate, undertake outreach activities related to Victims, especially Civil Parties; and
j) Adopt such administrative regulations as required to give effect to this Rule.

These rules provide significant levels of support for partie civile participation from investigation through to appeal, relatively unprecedented on a national court level. Reparations for victims are available under Cambodian law and thus do not feature as remedies of the Extraordinary Chambers, despite being able to be granted by the court. Victims may also initiate separate civil proceedings. Reparations may therefore be sought from the state following a criminal action where property may be seized by the state as part of proceedings.

The Special Panels of East Timor (Timor Leste) were established by the UN Transitional Administration in East Timor (UNTAET) to hold those to account for crimes around the referendum of independence in 1999 (see Reiger and Wierda 2006). The Districted Court of Dili holds Special Panels making the courts part of the domestic court structure. The Special Panels apply international human rights law as investigated and prosecuted

by international lawyers and staff. The enabling law is prescribed under UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor (6 March 2000) and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000) (see UNTAET 2000a, b). The Special Panels are composed of one national and two international judges. The rules of court were drafted in accordance with those of the ICC and thus victims may participate before the Special Panels while also enjoying certain protective measures. Victims may request investigations, to be heard during a hearing, and may also seek a review of decision not to prosecute.

The Internationalised Panels in Kosovo were established following the bombing of Kosovo by the North Atlantic Treaty Organisation (NATO) in 1999. The International Panels were established by UNSC Resolution 1244, which provided for a UN mission and administration of Kosovo. An initial idea of establishing a specialist court for ethnic war crimes was abandoned in favour of a specialty court within Kosovo's domestic judicial system (Hehir 2010). The Special Representative of the UN Secretary-General was allowed to appoint an international judge and prosecutor to work within the domestic courts, although the UN further extended this to appointment of Special Panels of two international judges and one domestic judge. The Criminal Procedure Code for Kosovo 2012 (Criminal No. 04/L-123) sets out the provisions relating to victim participation. Article 79(1) of the Code provides:

> Any person is entitled to report a criminal offence which is prosecuted *ex officio* and shall have a duty to do so when the failure to report a criminal offence constitutes a criminal offence.

The process across all phases further provides that the individual victim, or the victim's advocate where the injured party chooses not to appoint a lawyer, may examine witnesses and evidence before the court: Article 9(3) of the states:

> The injured party has the right and shall be allowed to make a statement on all the facts and evidence that affects his or her rights, and to make a statement on all the facts and evidence. He or she has the right to examine witnesses, cross-examine witness and to request the state prosecutor to summon witnesses.

Article 214(1) of the Code grants access to the case file in support of the victim's rights to examine evidence in court:

> The injured party, his or her legal representative or authorized representative, or victim advocate shall be entitled to inspect, copy or photograph records and physical evidence available to the court or to the state prosecutor if he or she has a legitimate interest.

Rights of interlocutory appeal are also granted to victims or the victims' advocate under art. 217(4) of the Code:

> If the state prosecutor rejects the application to collect evidence, he or she shall render a decision supported by reasoning and notify the injured party, the injured party's authorized representative, or victim advocate. The injured party, the injured party's authorized representative, or victim advocate may appeal such decision to the pre-trial judge.

The various courts constituted by and exercising international human rights law generally develop out of reference to the procedural rules of the ICC. The statute of the ICC (A/Conf 183/9) was adopted in Rome on 17 July 1998, and came into effect on 1 July 2002. The ICC comprises the Pre-Trial Chamber, the Trial Chamber, and the Appeals Chamber. The development of the Rome Statute and ICC draws from various rules and practices of international courts seeking to protect against violations of human rights law (Bassiouni 1999). The first applications for participation from victims occurred in the case from the Democratic Republic of Congo, as submitted by the International Federation for Human Rights. The Pre-Trial Chamber I remarked in *Decision on the Applications for Participation in the Proceedings of VPRS 1–6*, Pre Trial Chamber I (ICC 01/04, 17 January 2006), par [51]:

> In the Chamber's opinion, the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as 'either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different' (citations omitted).

The Rome Statute provides for the participation of the victim personally, or through counsel, under art. 68(3) of the Rome Statute:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The Rome Statute also refers to the Rules of Procedure and Evidence that constitute the role of the victim as partie civile alongside the state and defendant. Although the term 'partie civile' is adopted here, victim participation in the ICC traverses the civil law role of partie civile, accessory and adhesive prosecutor, and may even be identified as intervener, *amicus curiae* or friend of the court. Chapter 4, section 3, of the Rules of Procedure and Evidence deal with victims and witnesses. These rules provide for protective and special measures, for victim participation in court, for representation by counsel and for reparations (see Moffett 2014). Counsel participating in hearings on behalf of victims may make submissions and examine witnesses, address the Chamber during open and closing addresses, and submit evidence, with leave of the Chamber. Although the victim may be represented and be able to participate across various phases of a hearing, victims themselves do not have party status before the ICC, and victims apply to participate during the pre-trial phase. Counsel acting for a victim or victims will be able to participate but only in accordance with the requirement of the equality of arms between parties as recognised by the court (Jackson 2009; Johnson 2009). Rule 91(3)(b) provides:

> The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

In *Prosecutor v Katanga and Chui*, Appeals Chamber (ICC- 01/04-01/07, 22 January 2010, Judgment Entitled 'Decision on the Modalities of Victim Participation at Trial'), the ICC observed that, at par [52]:

> … article 68(3) does not preclude the Legal Representatives of the Victims from being permitted to request the Chamber to order the submission of certain evidence. The Chamber would point out that this is not a right, but a mere possibility granted to the victims, under certain conditions, in order to give full effect to the provisions of article 68(3) of the Statute, after having duly balanced their interests with those of the accused.

Although the Rome Statute does not contain a provision for equality of arms between participants, the ICC has moved to provide a measure of fairness between participants in proceedings. This is more important where hearings depart from an adversarial exchange between parties to include counsel representing the interests of victims. Whether the movement toward the inclusion of counsel for victims represents a shift in international justice from retribution to restoration is arguable, however, and remains to be established in evidence (see Ochoa 2013; War Crimes Research Office 2009: 36; also see War Crimes Research Office 2007). However, although counsel for victims have participated in pretrial hearings, they are less common during trial hearings and during the reparation phase, where the interests of victims may be more squarely raised on the basis of the assessment of the scope, damage, loss, or injury, which victims may have faced as individuals, or collectively, as required by rule 97(1).

Common and Civil Law Systems

Although a focus on the development of the role of the victim in systems of international justice and courts exercising rights of participation under international treaties or covenants provides some guidance as to victim trial rights in the twenty-first century, domestic law and procedure continues to provide the basis upon which most victims access justice following a crime. Domestic systems of justice are generally conceived as

separated by jurisdiction, and out of adherence to nationalised systems of common or civil law, are not seen to respond to one another. Although there are marked differences between the continental European approach and those of common law countries, an increased awareness of the role of the victim, the seeking of new solutions for the inclusion of the victim, and the increasing awareness of the international law obligations of nations, means that the twenty-first century criminal trial is witness to an increased degree of policy transfer between systems of justice.

This means that despite the suggestion that systems are incompatible as arising out of distinct legal traditions that may or may not include the victim, jurisdictions internationally are increasingly willing to learn from approaches that integrate the victim that may have been previously excluded as ill-considered or impossible. The removal of the victim for the public prosecutor in the common law was seen as largely distinct from and incompatible with the inclusion of the victim as partie civile, or as accessory, subsidiary, or adhesive prosecutor, in the European system. A brief consideration of the traditions from which each system of justice has emerged will provide foundation for the significance of policy transfer toward a framework of substantive and enforceable victim rights as significantly determinative of the modern adversarial trial as argued in this book.

Common Law Systems

Traditionally, common law systems of justice require that victims proceed through public officials who represent the public interest. This is important as the victim not only lacks standing in court, but is otherwise unable to influence the decisions of any public official—namely the police and public attorney or Crown prosecutor, when making any decision regarding a matter. Although this has not always been the case, as victims have arguably enjoyed diverse powers to negotiate a charge, settle, prosecute, and sentence (see Schafer 1968), these powers were significantly eroded in the twentieth century to the point that criminal justice has been largely characterised as not involving the victim at all, with the exception of appearing as a witness during proceedings.

Since the mid-1990s, many common law jurisdictions ratified aspects of the 1985 PJVC with a view to providing victims with a declaration or charter of victim rights that would apply on a domestic level. Many of these initial declarations have since been revised or wholly repealed and re-enacted, to provide victims greater access to justice. The *Canadian Victims Bill of Rights 2015* provides example of a recent enactment that seeks to set out a more coherent instrument for victim rights in Canada. However, the initial rights instruments of the 1990s were characterised by limited rights to fair and courteous treatment, to information, and to compensation or reparation. These rights were generally not enforceable against any particular person or agency but applied to all persons administering justice, with the noted exception of the judiciary. Access to compensation has existed since the 1970s across most common law jurisdictions. Compensation is state-based but may include amounts in reparation, where the offender has the capacity to pay. Compensation is generally available during sentencing, however in many jurisdictions as an adjunct and thus unrelated process to the sentencing of the offender, or through administrative process or tribunal. During the 1990s, many common law jurisdictions provided victims a statutory power to tender a VIS to inform the court of the harm consequent on the victim, as relevant to the objective seriousness of the offence, during sentencing. Although such statements have been controversial, impact evidence is now available for most criminal offences and may even apply to appeal decisions and parole hearings, post-conviction.

Other processes afford the victim a voice in common law proceedings. These generally include statutory reform to police and prosecutor powers where they engage at-risk or vulnerable victim groups (victims of family violence or sexual assault, for instance), guidelines or laws that seek to inform victims of decisions made by the police or prosecutor (charge or plea bargaining, to withdraw a matter or not proceed to prosecution), or to be consulted as to these decisions. Victims may also challenge key decisions made. The law of evidence has been substantially reformed to better support victim participation in court, during sentencing processes, and parole. These reforms that provide the victim degrees of access to justice largely form the content of this book.

Civil Law Systems

The continental European approach to criminal justice provides the victim greater access to justice by enabling the victim to adhere a compensation claim to the criminal matter at trial, and to also participate alongside the state prosecutor as accessory or subsidiary prosecutor, as partie civile. While victims do not act as subsidiary prosecutor often, it is a power that is long recognised as a right of the victim constitutive of the justice tradition of civil law countries (Safferling 2011). Importantly, although continental European jurisdictions provide similar rights in respect of victim participation, each have developed their own distinct legal tradition, where some jurisdictions have inquisitorial pre-trial processes initiated by a prosecutor and then taken over by an investigative magistrate or judge, followed by a trial characterised by an adversarial exchange between state and defence (and potentially the victim, acting through counsel) with a judge that is more independent than during the pre-trial phase. Most continental European jurisdictions have trial processes that are constituted through identifiable adversarial procedures involving examination of witnesses led by counsel. Such jurisdictions include Italy, The Netherlands, and Sweden. Other jurisdictions, such as Germany and France, are wholly inquisitorial, from pre-trial investigative process through to trial (Kury and Kichling 2011).

Most jurisdictions allow the victim to be represented by counsel where they participate as adhesive or subsidiary prosecutor, or both. Counsel may be privately funded or may be provided by the state, where the victim cannot afford a lawyer. This is particularly so where the victim is especially vulnerable, and may be standard for crimes involving sexual offending or homicide (Safferling 2011). Where present, counsel representing the victim will be able to request that the state investigates a particular complaint or allegation, to allow the victim to discover documents or evidence, to question witnesses in court, to claim reparation, to make representations as to the proportionate sentence, and to appeal decisions adverse to the victim or possibly prosecution case. Victims may also have the power to continue a state prosecution should it be withdrawn or abandoned by the state. France also allows non-government organisations to join as subsidiary prosecutor or partie civile where they have a vested interest in a matter (see generally, Brienen and Hoegen 2000).

The continental European tradition of affording the victim a greater role in criminal proceedings augments the trial process toward a participatory model of justice. Although the civil law system is generally held apart from accusatorial, common law processes, there are increasingly important points of connection to adversarial systems of justice, as canvassed throughout the chapters of this book. Chapter 4 contains a case study of Italian law reform regarding the 1988 transition from inquisitorial to a hybrid adversarial criminal procedure to demonstrate how boundaries that separate continental European processes may borrow from adversarial jurisdictions. Similarly, Chap. 4 also demonstrates how adversarial jurisdictions are increasingly willing to reform the law of evidence to better protect the victim, introducing modes of evidence that merge the boundaries between civil law, inquisitorial processes (see Summers 2007).

The Fourth Phase of Victim Rights

The rise of victimology as a discipline has been characterised as responding to the removal of the victim in the context of the failing of the welfare state. The first phase of victim rights, identified as the rise of victimology, saw focus shift from offender to victim by questioning the ways in which victims may contribute to or bring about their victimisation. While Mendelsohn's typology has been largely discredited as victim blaming, the rise of the 'criminal victim' in the 1940s did offer the world a new focus on the victim that mainstream criminology had otherwise ignored (see Elias 1985: 15). Mendelsohn's contribution to victimology, therefore, was the identification of the victim as an important and relevant subject of study. The subjective standing of the victim, moreover, was established as separate from the offender and indeed the institutions of justice that seek to protect the interests of the offender (Sebba 1982; Kirchhoff 2010).

Since the critical reception of Mendelsohn's criminal victim into the 1950s and 1960s, however, focus shifted toward the identification of the victim as a party or subject in need of help and support. Commensurate with the rise of the welfare state, the second phase of victim rights focused on benefits, specifically those owed to the victim in the context of a society

willing to identify and allocate resources to assist vulnerable, injured subjects. The victim was thus constituted as a subject of welfare reform, one to be pitied and protected. This phase saw the rise of victims' compensation and other support mechanisms to rehabilitate the victim following the offence, in due recognition that it was the failure of society and not the offender that was to blame for the ultimate hardship faced by the victim. Elias (1985; also see van Dijk 2009) characterised this phase as a new victimology of human rights, capable of encompassing both violations of crime and oppression.

The recognition of the limitations of the welfare state and its costly bureaucratic mode of operation was responded to by the rise of the third phase of victim rights. The cost of the second phase for victims included the loss of the ownership of their subjective standing as victimised for the general identification of the deserving welfare subject—someone who is weak, dislocated, marginalised, and peripheral. While Mendelsohn garnered focus on the victim for all the wrong reasons, that focus did identify the victim as a proponent of justice, as the injured party connected to the offender in the context of the criminal prosecution and trial. The focus on the victim as a welfare subject stripped the victim of their personal connection to the offence and the institutions of justice that give rise to powers of judgment and control for a socially ascribed persona that identifies the victim as removed from justice for offices and institutions of state power, working for the public good. Victims today contest this status by rejecting the term 'victim', and in particular the connotation that to be identified as victim is to be identified as weak, vulnerable, or fragile. The consequence of the rise of the victim of the welfare state saw the rise of the first victim rights groups that challenged the weakened standing of the victim and their removal from systems of justice for state control.

The third phase of victim rights came at a time of the general critique of state domination and an awareness of the costs of welfare control. This period also saw the rise of the neoliberal ideology of the individual possessed of rights for self-determination and respect. The 1985 PJVC bears witness to the rise of rights that recast the victim in a foundation of human rights that challenged the past problem of the sole identification of the victim as weak and removed. Rather, the shift to individual self-realisation and government benefited the victim by challenging the

conceptualisation of the victim as subservient to the state and as disconnected from the criminal offence by virtue of the intervention of the state in the policing, prosecution, and punishment of crime. This phase extended into the 1990s and the early years of the twenty-first century through the ratification of human rights instruments on the domestic level, which further influenced domestic law reform to better position the victim in the criminal trial. There is clear jurisdictional variance here. However, the focus on the rights of victims in international jurisprudence, the rise of ad hoc tribunals, culminating in the rise of the ICC and the identification of the victim in regional human rights frameworks such as the ECHR, is testament to the shifting identification of the victim as empowered by rights and benefits, rather than as wards governed by an all-powerful sate.

The reconsideration of administrative arrangements for victims that characterise the second phase also qualifies the third phase of victim rights. The modification of victims' compensation for modes of support and self-help with decreased emphasis on pecuniary awards demonstrates a shifting away from the welfare mentality of compensating the victim for the failure of the state to secure crime. New modes of victim support assist the victim by providing access to services and strategies to help the victim recover from the crime on their own motion. Furthermore, the rise of the Office of Commissioner of Victims' Rights across various common law jurisdictions sees the consolidation of the ratification of universal human rights by enabling the Commissioner to bolster and support those rights on a domestic basis. Certain jurisdictions allow the Commissioner to make enquiries and resolve disputes in accordance with the remit of their office, or the declaration or charter of victim rights as legislated. The rise of the Office of Commissioner helps consolidate the new rights and powers of victims and to manage them in a way that is consistent with the interests of the state and public.

The continuation of the rise of the victim possessed of human rights increasingly in an international context of natural rights to justice is giving rise to the fourth phase of victim rights. While the third phase of victim rights continues today, as do aspects of the first and second phases, the fourth phase concerns the emergence of substantive rights that can be

enforced against other stakeholders, specifically the state and defendant. This occurs in different ways, across various fields of enquiry (see Sebba and Berenblum 2014; van Dijk 1988). This fourth phase may be understood as the institutionalisation of the rights and powers of the victim as traced in this book, and involves the continuation of the rise of human rights in the third phase but significantly extends upon it as these rights work their way into domestic law and policy, and become part of the lexicon of rights and powers that phrase normative justice processes (see Doak 2008). The movement toward enforceable rights from service and participatory rights significantly advantages the victim in the modern justice context by reconfiguring the standing of the victim as a constitutive party in the justice system.

Victims increasingly possess rights that can lead to substantive outcomes. Rights to information, consultation and review are increasingly provided that impact substantive decisions made in the trial process. These are important developments for victims generally. However, the movement toward substantive, enforceable rights is reconfiguring the balance between the normative proponents of justice in an adversarial model. The changed interaction between state and accused, in the context of other trial participants, including victims, lawyers, the judiciary, and policymakers, attests to the fact that we have entered a fourth phase of victim rights. The rise of enforceable victim rights is thus significant because it is invoking legal and policy changes that are establishing a participatory model of justice that, controversially, is reconfiguring the relationships between the normative stakeholders of the criminal trial process. In this context, victims are being brought back into the justice system in a way that provides actual standing and control over proceedings and this realisation is increasingly institutionalised in a model of justice that understands the significance of victim rights and powers as they connect with and impact upon other trial participants. This may be the phase that leads to the realisation of the ownership of the conflict as proposed by Christie (1977). Not surprisingly, this institutionalising of victim power is of great concern to those proponents of the trial that are empowered by virtue of their normative, exclusive positioning.

The Trial as Contested Terrain: Normative Theory and Fourth Phase Rights

The normative theory of the criminal trial seeks to establish the foundational elements of the criminal trial process as securing the defendant's rights to due process and procedural fairness. The testing of the state case against the accused is central, and other interests, including those of the state in its apprehension of crime, the community, and those of the victim, are eschewed. At best, these influences are identified as detracting from the integrity of the trial, and fundamentally undermining it and compromising its capacity to exonerate the innocent, at worst. Normative theory has thus emerged as a popular reaction by some lawyers, the judiciary, policy-makers, and the academy as a means of establishing the criminal trial as a terrain of rights and powers for the protection of defendant interests (see Bottoms and Roberts 2010). This section examines the consequences of the assertion of normative theory to the exclusion of the victims and their rights to substantive and procedural justice.

While the criminal trial is an important institution for the determination of wrongdoing and the apportioning of proportionate punishment, the rise of normative theory is arguably a reaction to the changed status of the twenty-first century criminal trial and its capacity to provide a role for the community and victim. Increased rights of victims, in particular, those rights that afford victims some degree of protection in the trial process, new ways of giving evidence that protect the integrity of the victim as a vulnerable party, and rights that may grant victims some degree of substantive participation in the trial process by being able to make submissions that influence decisions made, confront the notion long held by jurists that the trial should not involve victims or their interests and that any degree of inclusion of the victim constitutes an unacceptable interference with long valued rules that protect the innocent. The rise of victim rights is thus seen as unwarranted political interference and the assertion of a normative theory is a response to that perceived interference.

The proponents of normative theory assert it as a reminder that the interests of the state and accused, and in particular the accused's right to a fair trial, should not be compromised by interests deemed external to the trial. While we must be careful to invoke law reform that seeks to modify

any of the rights and processes that protect the accused's access to justice, a resort to normative theory has the consequence of labelling as perverse those reforms that sit beyond the instrumental core of criminal law, or the moral philosophy of what we deem to be worthy of criminalisation (see Ashworth and Zedner 2014). As such, theorists that comprise the group of philosophers that argue for a normative theory of the criminal trial suggest that we are witnessing a departure from the principled core of criminal law, the rules and processes by which we determine wrongdoing and proportionate punishments, while the acts and behaviours that are deemed to be criminally offensive are broadened to include more public order-based offences, and more preparatory or inchoate offences (see Husak 2008). While victims are not the only subject of the critical edge of normative theory, in that normative theory seeks to critique the rapid expansion of criminal offences and a departure from standard principles of justice that ensures the measured development and growth of criminal law, victims are nonetheless implicated by reason of their identification with a political imperative cited as impetus for law reform, and the expansion of law.

The manslaughter of Thomas Kelly in July 2012 in Kings Cross in Sydney, New South Wales, and the resultant modification of the law of assault to include mandatory minimum terms, new police powers, changes to sentencing law, and associated changes to liquor licensing, demonstrates the capacity for victim interests to be cited as justification for significant legal and regulatory change (see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW)). The 2014 Act may be seen as a victory for victim groups in the context of effecting legal and regulatory change in support of crime prevention. As far as politically palatable change goes, citing the needless and tragic death of a young person goes far to justify extensive change, which may not have otherwise passed public, political, and legal scrutiny. However, early statistics regarding the incidence of assaults in the Kings Cross area suggest that the reforms are working, given that assaults are reportedly down when compared to pre-reform figures (Menéndez et al. 2015), and it seems that assaults have not increased in most neighbouring areas. The course of law reform that resulted from Parliament's reaction to the killing of Thomas Kelly shows how criminalisation is particularly sensitive to

the interests of victims and, arguably, those of ideal victims (see Christie 1986). Although data is now emerging hailing the 2014 reforms a success, and despite the need for ongoing testing and the consideration of what constitutes success from a number of variables and perspectives, the significant changes made to criminal law in the name of a particular victim are within the purview of those critical of the expansion of criminal law and policing power. Arguably, however, it is the exclusion of the victim as relevant to processes of criminalisation and the setting of a balanced criminal procedure that provides impetus for reforms of such largesse in the first instance.

The 2014 reforms to NSW law remain rightfully controversial because they came about in an undesirable way. The reforms were the answer to the denial and exclusion of victim interests, or the relegation of such interests to the periphery of justice. Rather than informed, incremental change, the 2014 reforms evidence an avalanche of change that was poorly received by lawyers and certain sections of a sceptical public. Normative perspectives on what should be relevantly subject to the protection of criminal law, and who should rightfully inform that development, lie at the foundation of such hostility. The rejecting of the victim as a party to crime and as an important agent of law reform that ought to be included in legal processes created a vacuum of policy to be filled. By neglecting the integration of the victim in the trial process, the tragic death of Thomas Kelly arguably allowed for the filling of this gap. The 2014 law reforms in NSW provide an example of gross, impromptu change, when a set of tragic circumstances arose that gained traction with political will for change.

While normative theory is valuable in that it is critical of the expansion of criminal law in an unprecedented, unprincipled, and poorly designed way, a denial of the rights of the victim as a proponent of justice leaves a gap in justice policy that will inevitably be filled. How this is filled, and under what consideration, depends on the extent to which a normative theory of the criminal trial informs processes of criminalisation that exclude the victim—a subject that has an undeniable connection to the offender and the outcomes of the justice process. There are consequences where victims are excluded as stakeholders of justice, and normative theory does little to alleviate the tensions that exist between adversarial discourse and the interests of victims to enquire into the justice process.

Thomas Kelly's death and the resultant reforms to NSW law provide a focus on the continued importance of the gradual, informed integration of the victim into legal proceedings. It also reminds us of the consequence of marginalising the victim and of letting a legal system fall out of step with like systems that have progressed the standing of the victim in a more measured way, in accordance with the fourth phase of victim rights.

Victims and the Criminal Trial: A Procedural Focus

This book is predicated on the basis of providing an analysis of the ways in which victims of crime are integrated into the modern adversarial criminal trial. As such, the chapters of this book are divided across the criminal trial process. The integration of victim rights into the twenty-first century follows a course of law reform that occurs in the particular, in that reforms tend to be focused on particular processes and powers exercisable during the individual phases of the trial—from arrest and pre-trial processes through to trial by judge and jury, sentencing, appeal, and parole. Discrete areas of victim rights, such as access to compensation and support and the rise of extra-curial rights in the form of the Office of the Commissioner of Victims' Rights and relevant declarations of rights that comprise that office, will also be included as separate chapters, given the close connection between these areas to the exercise of modern trial rights and processes.

Chapter 2 provides an overview and analysis of the rights and powers of victims in pre-trial processes. This begins with the rights of victims during the arrest process, followed by bail decisions, committals, discovery of evidence that concerns the interests of the victim, and relevant prosecutorial decision-making processes. This chapter sets out the range of pre-trial processes that concern the rights of victims as witnesses to the offence. Increasingly, victim interests are factored into relevant pre-trial decision-making processes, such as decisions regarding the setting of bail conditions adverse to the victim, committal proceedings where the victim may be called to testify, prosecution decision-making regarding charge decisions and plea-deals, including the victim's right to review,

or where evidence sensitive to the victim is subpoenaed as relevant to the preparation of the accused's case. While the integration of the victim and their interests is fragmented in accordance with the variability of pre-trial processes to which victim interests are relevant, the tendency is toward the emergence of substantive and enforceable rights and powers that afford the victim some input into decision-making processes.

The alternative pathways to justice, including restorative intervention and problem-solving justice, are the focus of Chap. 3. Increasingly, alternative pathways are providing a meaningful mode of justice participation for victims. These pathways are also increasingly connected to substantive decision-making processes concerning access to bail, and are relevant to sentence. Although there are numerous programs and modes of intervention affording the victim an opportunity to meaningfully participate in the intervention process, each program connects to traditional court processes as a recognised option to either divert the offender from court, or to provide an opportunity for the offender to evidence restoration in aid of mitigating bail conditions or sentencing severity, usually with the hope of avoiding a custodial term. Circle and Forum Sentencing will be considered, as will alternative options such as acts of apology, mediation, and community service work. Problem-solving and community justice will also be considered as a means of bringing together the benefits of restorative intervention within a problem-solving court environment. Restoration in the international law context is also considered.

Chapter 4 covers the role of the victim in the jury trial. This chapter examines the trial as a discrete process where the victim is increasingly possessed of rights and powers in the law of evidence and criminal procedure. Special privileges for victims called to give evidence where the victim is particularly vulnerable and new modes of evidence, including out-of-court and statement evidence, mean that the victim is able to participate in the trial in new ways, demonstrating how the trial may depart from its traditional adversarial structure to accommodate the victim. Rules regarding the testimony of the victim, consolidated under laws of criminal procedure and evidence, provide the victim with substantive rights that may be enforced against the accused by the prosecution, where vulnerable victims ought to be afforded the protections provided by law. This chapter will examine the role of the victim in the modern adversarial trial by considering developments

in international law, EU policy, and the ECHR. Furthermore, this chapter provides a case study of the reform of criminal procedure in Italy from an inquisitorial to hybrid adversarial system, to demonstrate convergence between national systems of justice and how policy transfer may influence legal development and reform between jurisdictions.

The significant role of the victim in sentencing proceedings is discussed in Chap. 5. One of the first venues of victim participation since the relocation of the victim in the 1990s, sentencing provides an opportunity for victims to present a VIS, now increasingly supplemented with a community impact statement (CIS), in addition to legislative reform requiring the court to consider the harm to the victim and the community, in addition to a range of aggravating circumstances relevant to the victim that increase the objective seriousness of the offence. Although victims participate by way of impact statement, such statements are increasingly being used by sentencing courts to inform themselves of harms to the victim that might not otherwise be in evidence. Thus, the sentencing phase involves increased direct or active participation by the victim but also requires counsel to closely consider the harm to the victim in their submissions on a proportionate sentence. The chapter also connects with Chap. 3 regarding the use of alternative pathways and intervention programs in determining a proportionate sentence and the increased significance of the role of the victim in that process.

Chapter 6 canvasses the role of the victim in processes of appeal, punishment, and parole. This chapter begins with a consideration of new rights that afford victims greater access to the criminal appeal process, a forum from which victims are traditionally wholly removed. The chapter then considers punishment and parole, which includes a focus on the role of the victim in prison-based offender mediation and in the parole decision-making process. The rise of victim registers, to be kept informed of the status of the offender and relevant developments on the standing of the offender, changes to their custodial status, release from prison on approved programs, escape, or an offender's application for parole and observance to the conditions of parole once granted, will be discussed. This chapter also considers the revival of preventative detention for serious recidivist offenders and the processes that allow a victim to make submissions where a court is asked to consider an additional or indefinite term.

Criminal injuries compensation and victim assistance as a mode of service delivery that allows the victim to gain faster access to services, and the steering of victims away from pecuniary settlements for expense reimbursement to meet the immediate needs of victims, is the focus of Chap. 7. Although received critically by some victims in NSW, the limiting of compensation payments for recognition awards and the provision of services such as counselling and medical treatment arguably meet the needs of victims in a more direct way that also reduces the time it takes to apply for and determine compensation. Alternatively, the UK model of criminal injuries compensation preserves lump sum payments subject to restrictions regarding the character of the victim and their entitlement as an innocent and deserving victim. This chapter also connects with Chap. 5 by considering the way in which compensation is increasingly being brought back into the courtroom having been largely removed as an adjunct application to sentencing since its inception circa 1970s. Some jurisdictions, including England and Wales and South Australia, now allow for the consideration of compensation alongside the sentence of the accused, and can even take awards of compensation or restitution taken from the accused directly into account in the determination of a proportionate sentence. This chapter will also make reference to the reparations options for victims in the ICC and adhesive compensation claims in the European civil law tradition with a focus on French criminal procedure.

Chapter 8 focuses on the rise of extra-curial rights in the Office of the Commissioner of Victims' Rights. This chapter also considers the ratification of declarations of rights on the domestic level, many of which now connect with and even constitute the powers available to Commissioners. This chapter demonstrates how the interconnected powers available to victims are being mediated through the Office of the Commissioner but that different Commissioners may also be a key driver for change by invoking a course of law reform to increase the rights of victims that bear on various parts of the criminal trial. The extent to which the charters and declarations of victim rights are enforceable will also be considered in the context of the 2004 changes to US law that allows for the enforcement of victim rights under the United States Code (USC).

The concluding chapter brings the arguments of this book together in a discussion of the role of the victim in substantive and procedural jus-

tice. The central theme of this book, that victims have increased presence in the twenty-first criminal trial, culminates in an understanding that the victim is increasingly constituted by substantive and enforceable powers that have forged a new role for the victim as a participant in the trial process. This emergence of the victim takes a substantive and procedural form, in that victims do not just participate but also have the capacity to make submissions that impact on the decisions made in the trial process. This conclusion challenges the normative assumptions inherent amongst some lawyers who interpret the rise of victim rights as derogating the procedural safeguards of the criminal trial, leading some to argue that the trial is indeed under attack. Rather, this chapter concludes that the twenty-first century victim has emerged as a party to proceedings in a way that balances participation between the state and accused, but in a measured and appropriate way. This book concludes that the incremental shifts that have led to the fourth phase of victim rights, the era of enforceable rights and powers, have allowed for the development and institutionalising of the rights of the victim as a trial participant, while also maintaining the accused's right to a fair trial. Although always controversial, these shifts now place the victim with the state and accused in a modernised adversarial criminal trial.

Notes

1. In certain jurisdictions, modification of the trial process and the law of evidence concerning sex offences began in the late 1970s. However, it was not until the late 1990s and early 2000s that such rights and protections became comprehensive for sex offences victims, and then universalised as an entitlement to all vulnerable victims and witnesses.
2. Section 32 of the *Domestic Violence, Crime and Victims Act 2004* (UK) creates the *Code of Practice for Victims of Crime*. The section prescribes who may be included in the Victims' Code and who is absolved of liability or duty accordingly: '(1) The Secretary of State must issue a code of practice as to the services to be provided to a victim of criminal conduct by persons appearing to him to have functions relating to: (a) victims of criminal conduct, or (b) any aspect of the criminal justice system. (2) The code may restrict the application of its provisions to: (a) specified descriptions of victims; (b) victims of specified offences or descriptions of conduct; (c)

specified persons or descriptions of persons appearing to the Secretary of State to have functions of the kind mentioned in subsection (1). (3) The code may include provision requiring or permitting the services which are to be provided to a victim to be provided to one or more others: (a) instead of the victim (e.g., where the victim has died); (b) as well as the victim. (4) The code may make different provision for different purposes, including different provision for: (a) different descriptions of victims; (b) persons who have different functions or descriptions of functions; (c) different areas. (5) The code may not require anything to be done by: (a) a person acting in a judicial capacity; (b) a person acting in the discharge of a function of a member of the Crown Prosecution Service which involves the exercise of a discretion. (6) In determining whether a person is a victim of criminal conduct for the purposes of this section, it is immaterial that no person has been charged with or convicted of an offence in respect of the conduct. (7) In this section: 'criminal conduct' means conduct constituting an offence; 'specified' means specified in the code.'

3. See Chap. 8 for a discussion of extra-curial rights and powers for victims of crime.
4. Enforceable rights are discussed throughout this book but consultative rights in pre-trial processes are principally discussed in Chap. 2.
5. Also see *Perez v France* (2004) ECHR 47287/99, at par [68].

2

Pre-Trial Processes: Arrest, Bail, Discovery and Prosecution Decision-Making

The Victim as Protagonist of Rights and Powers

The pre-trial phase is one that is often considered to be hidden from the critical gaze of the public, who focus instead on the jury trial as the main arena of contestation for trial participants. The pre-trial phase is, however, significantly determinative for all participants and often includes opportunities for victim participation that impacts on later phases of the trial. While the offender will definitely experience processes that shape the options they face in later stages, victims are increasingly being invited to participate through consultation or negotiation with the state, with the object of including the perspective of the victim in key decisions made. While this participation may encourage a more positive reflection of the trial process, there are often other reasons that go toward substantive decision-making that require victim participation in the pre-trial phase. Thus, it is remiss to suggest that victim participation results from the increase of service level rights that afford the victim access to information or base level treatment alone. Rather, the pre-trial phase has for some

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time been the phase of the criminal trial that establishes the substantive capacity of the victim as a stakeholder in the criminal trial process.

Our focus on the jury trial as the main arena of criminal law shapes the public conceptualisation of criminal law and procedure generally. However, the pre-trial rights and powers of the victim substantially demonstrate how the victim is a protagonist in the early stages of the trial process. The interests of the victim in pre-trial processes span the policing and investigative process, and their rights and powers cross various aspects of pre-trial decision-making, including charge decisions, bail, plea-deals, and access to evidence. These rights, powers, and interests establish the victim as an actual pre-trial participant and substantive decision-maker with access to enforceable level rights. Although the extent to which participation and substantive decision-making is invited from victims varies across jurisdictions, certain common law powers tend to be consistent at the time of arrest and during the evidence-gathering phase. Other rights and powers have been inserted by virtue of law reform or by expansion of declarations of victim rights as they apply to certain jurisdictions or certain officeholders, such as the police or prosecutor, in certain jurisdictions. Thus, the pre-trial phase is one that represents the expansion of victim rights, which are being slowly enlarged and further integrated into this phase, albeit in an uneven way across jurisdictions. The movement, however, is toward enforceable rights of a substantive character, despite being weighed against the public character of criminal law and procedure at each point in the process.

This chapter covers the rights of victims that have emerged regarding the arrest of the suspect, the duty to consult, the duty to regard the status of the victim in bail decisions, pre-trial discovery of materials sensitive to the victim, and the duty to consult with victims when charging or when making a plea-deal. The contested status of victim participation in this phase, including the independence of the police and prosecution, will also be covered.

Arrest

Powers of arrest have long been associated with the victim of crime. Victims were required to apprehend felons long before the office of common law constable was established in the thirteenth century. The right of

the victim to apprehend a felon, to cross jurisdictional or county lines, to detain the suspect and to bring them to justice were powers afforded to the victim out of the necessity to apprehend wrongdoers in an era where communities lacked specific officeholders or an institutional capacity to police crime for the good of the community. The creation of a Crown office of constable, a voluntary role that was often requested of a member of the nobility by the Crown, or billeted to another in their place, affected a transfer of the common law powers of the victim, or informant, to that office. Importantly, victims retained their power to pursue the felon and bring them to justice. Similarly today, the power available to each informant to detain a felon on reasonable suspicion characterises the common law of arrest that is exercisable by each common law constable, now a member of an organised, metropolitan police service or force.

The powers of the victim are thus contained in statutes that organise, consolidate, and extend upon their common law powers. These powers have long been disassociated from the victim, and although the historical connection remains at law, society now regards policing powers as exercisable by members of a state police force alone. However, the s 24A of the *Police and Criminal Evidence Act 1984* (UK) continues to recognise the foundational rights of the victim in the apprehension process:

(1) A person other than a constable may arrest without a warrant:

   (a) anyone who is in the act of committing an indictable offence;
   (b) anyone whom he has reasonable grounds for suspecting to be committing an indictable offence.

(2) Where an indictable offence has been committed, a person other than a constable may arrest without a warrant:

   (a) anyone who is guilty of the offence;
   (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

Section 100 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) also recognises these foundational powers:

(1) A person (other than a police officer) may, without a warrant, arrest a person if:

(a) the person is in the act of committing an offence under any Act or statutory instrument, or
(b) the person has just committed any such offence, or
(c) the person has committed a serious indictable offence for which the person has not been tried.

(2) A person who arrests another person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.

Although sparingly exercised, the victim's right to arrest a suspect, otherwise known as a citizen's arrest, founds the power exercisable by each constable in the conduct of their office. Following from this foundation, police exercise the rights of the common informant when bringing offenders to justice, namely, when they inform a Magistrate of an offence.

Prosecution associations for the apprehension of felons utilised the powers of the common law constable and common informant and existed before the rise of organised, state police forces. King (1989) suggests that thousands of prosecution associations were formed in England in the eighteenth and nineteenth centuries, possibly as many as 4000 but at least 1000, which actively sought out felons and prosecuted them, exercising the victim's right to apprehend the felon and then inform a court of an offence by right of private prosecution. Such associations initially apprehended those suspected of the most serious offences of murder or rape, but associations were also formed toward the latter part of the nineteenth century to focus on property offences. These associations were increasingly common during the industrial revolution where goods were produced, capable of being stolen, and where the owners of such goods would seek to secure their right to possession, to recover goods that were stolen, or to deter offending in the first instance. Participants in such associations often paid dues to the association to meet various costs of apprehending and prosecuting crime, including the costs of unsuccessful prosecutions.

Although prosecution associations did more than police crimes, the apprehension of felons was an important function that essentially initiated the prosecution process against suspects. The benefit of such association was that members were committed, morally if not financially, to

pursue offences and offenders, to apprehend offenders and bring them to justice, and to provide for the further good of the association by seeking to recover damages where possible or desirable. Apprehending felons also had the advantage of removing a felon from the population of those likely to commit further crimes. Philips (1989) notes that such associations were committed to their role of apprehending crime to the extent that some associations chose to prosecute offence against non-members. Although the protection of property was increasingly important into the industrial revolution, the consensus that has emerged amongst those studying prosecution associations is that they were largely motivated by a commitment to crime deterrence in an era before the emergence of an organised police force, and where the police at the time of establishment only initially prosecuted the more serious interpersonal crimes (Godfrey 2008).

Police powers have, however, been substantially developed by statute since the time of the common law constable and the transformation of that office into a metropolitan police force. A professional police force was first established in 1829 in London, and in 1939 in the counties. Statutory development has significantly extended police power since the creation of a professional force, enabling the modern police to exercise powers that the common informant could not. This extension of the common law stemming from the power of the common informant has enabled the modern police to target specific harms or risks, to gain access or entry, search for and seize evidence, and to do so with or without a warrant, depending on particular circumstances. In extraordinary circumstances, Parliament has granted the modern police power to exercise significant powers in the face of gross public disorder, by locking down geographical areas, searching persons without cause, and seizing evidence connected to the disorder. These statutory reforms have also been extended by way of policy development as based on the existing legal framework. The development of appropriate responses for the protection of domestic violence victims presents an apt case study on the intersection of the foundational powers of the police, the need for discrete statutory reform to better recognise the specificity of domestic violence, and the development of a relevant policy approach that enabled victims to indeed be protected from violent offenders.

Domestic Violence Law and Policy: Victims and the Development of Police Power

Parliament has also chosen to extend police power to assist vulnerable and at-risk groups. This is most notable regarding domestic violence offending, where existing police powers have failed to enable police intervention in what has been recognised as a hidden offence. The common law powers available to police called to attend a complaint of domestic or family violence may not have the power to enter a property and arrest a suspect without warrant. This is because the level of harm that the attending police officer reasonably suspects was occasioned to the victim may not be obvious or actualisable on the body of the victim. The victim may be in fear and may deny any harm to them, and neither offender nor victim may permit the officer access to the residence. As such, the officer may not be able to form the requisite reasonable suspicion in order to be satisfied that a felony has occurred, thereby enabling the officer to force entry and make an arrest. The provisions of s 83 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) now enable a police officer to apply for a warrant where entry is otherwise denied. The warrant may be sought from an authorised officer commissioned to issue warrants, such that appearance before a Magistrate is not necessary:

> (1) A police officer may apply to an authorised officer for a warrant if the police officer:
>
> (a) has been denied entry to a specified dwelling, and
> (b) the police officer suspects that:
>
> (i) a domestic violence offence is being, or may have been recently, committed, or is imminent, or is likely to be committed in the dwelling, and
> (ii) it is necessary for a police officer to enter the dwelling immediately in order to investigate whether a domestic violence offence has been committed or to take action to prevent the commission or further commission of a domestic violence offence.

(2) An authorised officer may, if satisfied that there are reasonable grounds for the police officer's suspicion, issue a warrant authorising any police officer:

(a) to enter the dwelling, and
(b) to investigate whether a domestic violence offence has taken place or to take action to prevent the commission or further commission of a domestic violence offence, or both.

In England and Wales, changes to Part IV of the *Family Law Act 1996* (UK) have meant that a person could be arrested where violence was threatened. This overcomes limitations inherent in the common law of arrest and sought to assist those victims that would not otherwise present harms that would allow for a common law arrest. Today, s 10 of the *Domestic Violence, Crime and Victims Act 2004* (UK) makes common assault an arrestable offence enabling the police greater access to the accused with increased capacity for intervention by way of arrest, in a domestic violence situation. This meant that a suspect could be arrested and detained without the need for the police to leave the offender with their victim while they applied for a warrant.

Sections 24–33 of the *Crime and Security Act 2010* (UK) allow the police to issue a domestic violence protection notice or order, the latter with leave of a Magistrate. A Domestic Violence Protection Notice may be issued by a senior police officer not below the rank of Superintendent where there has been violence or threatened violence toward a victim, and the issuing of a notice is necessary to protect the victim from actual violence or a threat of violence. Domestic Violence Protection Orders enable the police to seek an order from a Magistrate on satisfaction that, on the balance of probabilities, the accused has been violent toward, or has threatened violence toward, the victim, such that the court thinks that making the order is necessary to protect the victim from violence or a threat of violence. Such processes now allow police to circumvent limitations inherent in the common law of policing in order to meet the needs of vulnerable and often hidden victims protecting families considered to be in fear of domestic abuse. Orders are used where police believe that a victim is at risk of violence but where there is insufficient evidence to charge the offender.

In 2009, Clare Wood was murdered by her partner, George Appleton, in a horrific set of circumstances in Salford, Greater Manchester. Clare had been wary of the violent tendencies of her partner, who had assaulted and even kidnapped his previous partners, developing a criminal record for such assaults. The details of this record were not known to Clare and were not disclosed to Claire, even after making complaints to police as to her partner's harassing, and increasingly violent, behaviour. Following the issuing of a harassment order, Clare was raped, strangled and her body set on fire. As news of the history of undisclosed violence came to light, a report was commissioned by the Home Office in 2009 by Chief Constable Brian Moore of Wiltshire Police on behalf of the Association of Chief Police Officers, *Tackling Perpetrators of Violence Against Women and Girls*. Moore (2009) published ten recommendations that included the introduction of new rights that afforded persons at risk of victimisation the 'right to know' about relevant information in the possession of the state. Although disclosure should not become common practice, there will be circumstances where victims need to know about the violent past of a partner in order to enable them to make proper, informed choices about their safety, and the safety children.

Following the recommendation for a disclosure scheme, a Domestic Violence Disclosure Scheme was developed within the existing legal framework. Such disclosure must be made with regard to existing legal obligations on the state including obligations pursuant to the *Human Rights Act 1998* (UK), the *Data Protection Act 1998* (UK) and the *Rehabilitation of Offenders Act 1974* (UK). The Domestic Violence Disclosure Scheme provides two points of inquiry, which may mean that a disclosure is necessary. The first step, the 'right to ask', is based on the Child Sex Offender Disclosure Scheme (see *The Child Sex Offender (CSO) Disclosure Scheme Guidance Document*). This step is raised when a victim makes a complaint to the police seeking information about their abusive partner. The second step, the 'right to know', occurs when the police have relevant information or intelligence about the safety of the victim, and where the police determine that in the circumstances a disclosure should be made for the protection and safety of the victim or her children.

Charging the Suspect: The Duty to Consult

At law, police are not obliged to consult with a victim prior to making a decision as to charge, or which charge, to bring against an offender. This results from the transferring of police power to a professional police force that in the modern context is not dependent on the victim's consent to prosecute. The police exercise the power of the common informant, which, although exercised by the victim historically, is now taken up by an organised, professional service that exercises a policing function for the good of society. Despite this transfer of power, the right to charge and inform a court of an offence continues to reside in the common informant and is therefore a power shared amongst all persons generally. This sharing arrangement stems back to the duty to keep the peace, and the requirement that all persons owe a duty to apprehend crime and inform a court of serious offending. Nonetheless, the modern power of arrest and the decision to charge is conventionally exercised by the police, and the victim's right to be consulted in this process has become the subject of recent attention as victims seek to consolidate their agency as important protagonists in the prosecution process. Welling (1988) provides an overview of the relevant tension between the duty to charge and prosecute in the public interest against the need of the victim to be part of a process of great concern to them. That tension is arguably exacerbated because victims have been granted rights in other phases of the pre- and post-trial process, including participation in plea-bargaining and sentencing. However, Welling (1988: 116) suggests that limited rights of participation in charging may be appropriate:

> The benefits of victim participation in charging include the victim's feeling of being a part of the criminal justice process. Another benefit is that public confidence in charging decisions is bolstered by knowledge of victim participation in the process. The detriments of participation are that the process is slowed, and that the possibility of inconsistency in charging decisions is increased. Any participation right must be formulated with these pros and cons in mind. The main benefits of victim participation derive from the process of participation as opposed to any impact the participation would have on the substance of the decision. Therefore, the victim should be accorded a right to be heard, but the victim should have no right to determine the substance of the charging decision.

Much of the development toward the duty to consult actually regards the victim's right to be kept informed. The *Victims Bill of Rights Act 2015* (Can) enacts the *Canadian Victims Bill of Rights,* while also amending other acts, including the Canadian Criminal Code with respect to victim rights and interests, and the obligations owed to victims by state departments. The *Canadian Victims Bill of Rights* sets out the rights now available to victims of crime across Canada. Several of these rights concern the victim's right to information and to communicate their views where their rights are being considered by an authority. Section 2 of the 2015 Act contains that *Canadian Victims Bill of Rights*. Clauses 7 and 14 concern rights that may modify the victim's right to be informed and perhaps consulted during the investigation:

> 7. Every victim has the right, on request, to information about (a) the status and outcome of the investigation into the offence; and (b) the location of proceedings in relation to the offence, when they will take place and their progress and outcome.
>
> 14. Every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under this Act and to have those views considered.

While these rights do not modify the power of the police to charge or the state to prosecute, they do provide a mechanism by which complaints may be resolved should a victim feel that their rights under the *Canadian Victims Bill of Rights* have not been maintained. Clause 25 provides that such dispute resolution should be provided by the criminal justice department owing the right to the victim in the first instance.

In New South Wales, the police are not obliged to consult with the victim while investigating an offence or considering a charge. However, the *Victims Rights and Support Act 2013* (NSW) contains the Charter of Rights of Victims of Crime under s 6 of the Act. Clause 6.4 provides:

> 6.4 Information about investigation of the crime
>
> A victim will, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim will be informed accordingly.

In England and Wales, police make the decision to charge pursuant to s 37 of the *Police and Criminal Evidence Act 1984* (UK). Under the same Act, s 37A provides that guidance may be issued by the Director of Public Prosecutions with regard to s 37(7), which gives the police several options as to whether to charge or not, following the determination of the sufficiency of evidence against a suspect.[1] The *Directors Guidance on Charging* provides the tests and standards by which preliminary evidence will be weighed and judged in order to determine whether a suspect ought to be charged or not, and any conditions associated with the charge, including out-of-court disposal. The *Directors Guidance on Charging* affirms, however, that charge decisions are ultimately those of the police or Crown Prosecution Service (CPS). However, despite a victim's lack of capacity to consent to a charge or prosecution, various service level rights have emerged that support the victim's access to information. Ultimately, this information, and the extent to which a victim is included in any pre-charge consultation, however informal, will make the difference between whether a victim is satisfied with the outcome or seek to exercise review options, where available. These options are covered in the next section.

Section 2 of the *Code of Practice for Victims of Crime* provides that:

> 2.1 The police must inform victims of all decisions to prosecute or to give the suspect an out-of-court disposal, including all police cautions.
>
> 2.2 The police must inform victims of all police decisions not to prosecute a suspect and they must give reasons for the decision to the victim.
>
> 2.3 Where the CPS decides not to prosecute during a charging consultation, the police must inform the victim of the decision, the reason for the decision (insufficient evidence or on public interest grounds), how they can access further information about the decision from the CPS and how they can seek a review of the decision if they are dissatisfied with it.
>
> 2.4 Victims of the most serious crime, persistently targeted victims and vulnerable or intimidated victims must be provided with the information in paragraphs 2.1-2.3 above within 1 working day of the suspect being charged, being told that no charges will be brought, or being informed that they will be given an out-of-court disposal. All other victims must be provided with this information within 5 working days.

The Director of Public Prosecutions has also issued guidance as to the consultation requirements under the Victims' Code. The *Code of*

Practice for Victims of Crime: CPS Legal Guidance provides that the victim needs to be kept informed and seek further information from the CPS. Importantly, the guidance now references the Victims' Right to Review Scheme where the victim is not satisfied with an outcome:

> Duties on both the police and CPS in respect of charging are outlined in section 2, Chapter 2, Part B of the revised Victims' Code, which does not create any additional responsibilities for either the police or CPS.
>
> Paragraph 2.1 - the police will continue to inform victims of all decisions to prosecute or to give the suspect an out-of-court disposal, including police cautions.
>
> Paragraph 2.3 - where the CPS decides not to prosecute during a charging consultation (this includes face-to-face meetings, Area consultations, telephone and digital consultations held in accordance with the DPP's guidance), the police must inform the victim of the decision, how they can access further information about the decision from the CPS and how they can seek a review of the decision if they are dissatisfied with it under the Victims' Right to Review (VRR) scheme.

The requirement to consult with the victim is thus contained in policy that sets out the duties of the police and CPS to make charging decisions in the public interest. Where a decision adverse to the victim is made, the victim generally has a right to review, but this does not include those matters where the police choose not to investigate or charge in the first instance, with or without consultation from the CPS, or where some charges are terminated but others continue.

The duty to consult is now provided under the law of Scotland to the extent that certain senior office holders spanning the executive and judiciary are required to pay regard to specified principles when carrying out functions of their office as they relate to victims. These principles span the investigation and charging phase but also include other relevant pre-trial hearings. Section 1(3) of the *Victims and Witnesses (Scotland) Act 2014* (Scot) provides:

> s 1(3) The principles are:
>
> (a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,

(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,
(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
(d) that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.

The right to information about the investigation of a crime and to information about the person being prosecuted, including the charges brought against an accused or reasons for not bringing charges, is now contained in the Charter of Rights for Victims of Crime in NSW, pursuant to s 6 of the *Victims Rights and Support Act 2013*. The relevant clauses provide:

6.4 Information about investigation of the crime

A victim will, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim will be informed accordingly.

6.5 Information about prosecution of accused

(1) A victim will be informed in a timely manner of the following:
    (a) the charges laid against the accused or the reasons for not laying charges,
    (b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges,
    (c) the date and place of hearing of any charge laid against the accused,
    (d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.

The rights provided under the charter of rights for victims of crime in New South Wales are not enforceable but are best characterised as service level rights. Although they provide some degree of participation in the investigation process, they do not entitle victims to any formal role in court proceedings nor do they allow victims to contest any outcome with which they disagree. However, such rights are an important complement

to general rights to fair treatment and access to justice. By identifying discrete aspects of the pre-trial investigative and charging process, victims are brought into the system with a view to consultation and explanation of decisions made. In New South Wales, this is restricted to serious crime that involves sexual violence. Although charging decisions are not invalidated where the victim is not consulted, the best practice would require that victims are consulted and informed of outcomes. This would have the effect of supporting the victim with a view to encouraging their participation as a witness in proceedings, which is generally necessary for sex offences proceedings.[2] Clause 6.5 also deals with aspects of charge and plea-bargaining, discussed below.

Bail

Significant reforms to the law of bail have refocused the process on the interests of the victim as pre-trial process that often concerns the safety and welfare of the victim. Although continuing threats to the victim have always been relevant bail considerations for those charged where police or court bail must be determined, statutory reform of the process has led to the need for bail decisions to consider issues relevant to the victim.

While bail concerns must be assessed for all suspects charged, unacceptable risk provisions of *Bail Act 2013* (NSW) s 19 provide that bail will be refused where an accused, among other things, endangers victims:

> (1) A bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns under this Division, that there is an unacceptable risk.
>
> (2) For the purposes of this Act, an 'unacceptable risk' is an unacceptable risk that the accused person, if released from custody, will:
>
> (a) fail to appear at any proceedings for the offence, or
> (b) commit a serious offence, or
> (c) endanger the safety of victims, individuals or the community, or
> (d) interfere with witnesses or evidence.

Should bail be granted, Section 20A provides that a court may impose bail conditions, or a conduct requirement, which may include a non-association order such that an accused is not to contact or visit a victim, their home, or place of work. Section 30 allows a court to impose an enforcement condition on the accused, at the request of the prosecution. An enforcement condition is in addition to an underlying bail condition or requirement and will allow the police to monitor an accused's compliance with those conditions.

In New South Wales, the charter of rights for victims of crime, pursuant to s 6 of the *Victim Rights and Support Act 2013* (NSW), sets out non-enforceable rights regarding bail decisions.[3] These emphasise the need for protection from the accused, information regarding special bail conditions where set, and the requirement that a victim be informed of a bail outcome for sex and other offences involving serious personal violence. The relevant clauses provide:

> 6.11 Protection from accused
>
> A victim's need or perceived need for protection will be put before a bail authority by the prosecutor in any bail application by the accused.
>
> 6.12 Information about special bail conditions
>
> A victim will be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.
>
> 6.13 Information about outcome of bail application
>
> A victim will be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence.

In England and Wales, the *Bail Act 1976* Sch 1, s 2 provides that:

> (2) The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would:
>
> (a) fail to surrender to custody, or
> (b) commit an offence while on bail, or
> (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

The power of the police to grant conditional bail under s 27(3) of the *Criminal Justice and Public Order Act 1994* (UK) also takes into account the accused's likelihood of interfering with witnesses, which includes victims. *CPS Legal Guidance: Bail* sets out the need to consult with victims and to keep victims informed of bail outcomes and conditions:

> When dealing with bail hearings in court, prosecutors should ensure that the victim's view is considered. Prosecutors are also reminded to ensure that victims are informed of bail decisions especially in cases involving 'vulnerable' and 'intimidated' victims and witnesses.

Further guidance is available through a range of policy documents drafted by the CPS. Most connect back to the basic duties owed to victims under the Victims' Code. Both the *CPS Direct Communication with Victims—CPS/ACPO National Framework for Local Protocols* and the *CPS Care and Treatment of Victims and Witnesses*, provide measures and standards when dealing with a victim generally, and include particular measures for victims of particularly serious offences. The *Victim Focus Scheme: CPS Guidance for Bereaved Families* sets out the role of the Family Liaison Officer, provided in homicide cases. The Family Liaison Officer may help a family member make a victim personal statement (VPS) which will then be passed onto the prosecutor. Although this is likely to occur as a matter progresses toward sentencing, it may be relevant to informing the prosecutor of risks to the victim and an associated trial decision. Where a VPS is not drafted until after bail has been determined, the Family Liaison Officer may communicate the needs of family victims to the prosecutor directly.

The law of bail in Ireland has recently been proposed to allow greater victim input into bail determinations. This followed reports of significant levels of offending while accused persons were bailed, the lack of police power to arrest without warrant those offenders who intimidate or harass witnesses or victims, and will place further restrictions on those person granted bail, including more limited rights to bail for serious offences.

The *Bail Bill 2015* (Ire) provides greater rights for victim participation in the decision-making process. Head 28 of the Bill provides:

Power to hear complainant evidence in bail applications

Provide that:

(3) A court considering an application for bail may, on the application of a member of the *Garda Síohána*, hear evidence from the complainant as to:

(a) the likelihood of direct or indirect interference or attempted interference, within the meaning of Head 26(2), by the accused person with the complainant or a family member of the complainant;
(b) the nature and seriousness of any danger to any person that may be presented by the release of the accused person on bail.

The *Bail Bill 2015* (Ire) also provides extended powers to victims where a court is considering bail post-conviction. Head 35 of the Bill provides:

Victim evidence in post-conviction bail proceedings

Provide that:

(1) For the purposes of Heads 33(2), 34(2) and 37(4), a court may hear evidence from the person in respect of whom the offence was committed as to the risk that the convicted person will interfere with, seek retribution against, or otherwise cause harm to the person in respect of whom the offence was committed or a family member of that person.

Although exercised where an accused may otherwise be facing a non-custodial or suspended term of imprisonment, bail following conviction did not regard the circumstances of the victim as continuing to be vulnerable to the acts of the accused. The awareness of the needs of the victim post-conviction and sentence are increasingly subject to law reform. This is considered in detail in Chap. 6 regarding significant changes to the parole process in Victoria, following the rape and murder of Jill Meagher.

Plea-Bargaining

The plea-bargaining process, or the offering of a lesser or reduced number of charges on the basis of a guilty plea, can be a difficult period for victims. Disappointment by victims may result where there are height-

ened expectations on the part of the victim, poor police or prosecution communication with the victim, together with a limited understanding of the difficulties of prosecuting the higher or more serious offence. The management of victim expectations is often said to be paramount during the phase of charging and the possible negotiation of a guilty plea (Welling 1988). This is the phase where victim input, access to information and consultation is traditionally held at a minimum out of the need to consider the charge and the offering of a plea-deal in the public interest, which may include the less understood need to avoid a long and expensive trial. As such, the interests of the victim become peripheral to the needs of justice. This tendency has resulted, however, in plea-deals being reached that have not been sufficiently communicated to the victim and where victim disquiet then raises the plea-bargain as contrary to the interests of the victim and justice generally.

Where a case against an accused is strong but where there are arguable facts or issues capable of being contested, counsel for the accused may seek to reduce the number or seriousness of the charges by negotiating with the prosecution. There are various circumstances that support the making of a plea-deal, albeit many of these circumstances do not involve direct input from the victim. Where negotiations are possible, counsel will generally focus on correcting facts in issue that are wrongly stated and not otherwise in dispute, challenging the seriousness of the charges against the available facts and law as stated, having duplicitous charges withdrawn or considered as one incident, as well as seek an indication from the prosecution that there is the likelihood of a lesser charge for a guilty plea. These negotiations will almost always occur privately, between defence counsel and the prosecutor, and are then seen as a hidden process that excludes victims, the public, and the courts.

The once hidden process of the making of a plea-deal is increasingly subject to scrutiny, and guidance is now available to assist prosecutors in their offer of a plea to the accused. The *Code for Crown Prosecutors* provides the requirement to consult with the accused under clause 9.3:

> In considering whether the pleas offered are acceptable, prosecutors should ensure that the interests and, where possible, the views of the victim, or in appropriate cases the views of the victim's family, are taken into account

when deciding whether it is in the public interest to accept the plea. However, the decision rests with the prosecutor.

In New South Wales, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* provides guidance to prosecutors on the acceptance of guilty pleas pursuant to cl. 20:

> The views of the victim about the acceptance of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final decisions are made; but those views are not alone determinative. It is the general public, not any private individual or sectional, interest that must be served.

The charter of rights for victims of crime under the *Victims Rights and Support Act 2013* (NSW) s 6 sets out the rights of the victim in relation to charging and plea-deals. Clause 6.5 provides:

> cl. 65 Information about prosecution of accused
>
> (1) A victim will be informed in a timely manner of the following:
>
> (a) the charges laid against the accused or the reasons for not laying charges,
> (b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges,
> (c) the date and place of hearing of any charge laid against the accused,
> (d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.
>
> (2) A victim will be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim, unless:
>
> (a) the victim has indicated that he or she does not wish to be so consulted, or
> (b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

Section 35A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that, prior to the court accepting a plea by the accused, the Director of Public Prosecutions must present to the court a certificate that attests that the victim, the investigating officer, and prosecutor consulted as to the deal reached, or where no consultation occurred, the reasons why. The section further requires that the statement of facts in the charge bargaining process represents a fair and accurate record of the objective criminality of the accused.

The scholarship around victim participation in plea-bargaining supports the victim's right to information but generally limits support with regard to the prerogative of the state to determine appropriate charges in exchange for a guilty plea (see Ma 2002). Certain states have moved to provide the victim more than access to information by prescribing rights to consult with the prosecution.

South Australia provides the victim the right to consult with the prosecution prior to any decision being made. Section 9A of the *Victims of Crime Act 2001* (SA) requires that the victim of a serious offence be consulted before any decision is made:

(a) to charge the alleged offender with a particular offence; or
(b) to amend a charge; or
(c) to not proceed with a charge; or
(d) to apply under Part 8A of the Criminal Law Consolidation Act 1935 for an investigation into the alleged offender's mental competence to commit an offence or mental fitness to stand trial.

This section refers directly to pre-trial decision-making involving public prosecuting authorities. The then Attorney-General for South Australia, the Hon M.J. Atkinson, said in his second reading speech on the *Statutes Amendment (Victims of Crime) Bill 2007* (SA):

> Victims of some serious crimes will have the right to be consulted before the Director of Public Prosecutions enters into a charge bargain with the accused or decides to modify or not proceed with the charges. Victims of crime will also have the right to more information about the prosecution and correction of offender. (Attorney-General Atkinson, *Hansard*, Legislative Assembly of SA, 24 July 2007, 609–610)

Section 9A thus provides a basis for substantive rights for crime victims. Rights to consultation, and what counts as meaningful consultation with victims, has a developed history in US federal courts. The USC provides for the right for victims to confer with the state attorney pursuant to 18 USC § 3771. *In re Dean* (2008) 527 F 3d 39 is authority for the granting of relief by way of mandamus requiring the prosecutor to consult with the victim prior to making key decisions in the pre-trial process, including plea-deals, in federal district courts (see Beloof 2005). Also see the critique of illusory rights and the development of enforceable rights in the US context in Chap. 8.

Withdrawal of Charges and the Victim's Right to Review

This section examines the continuation of the trend toward the provision of enforceable rights for victims of crime by examining the ratification of the victim's right to challenge and seek review of a prosecutor's decision not to proceed with a charge. The case of *R v Killick* (2011) EWCA Crim 1608 provided the means by which the Court of Appeal of England and Wales considered the 2011 CEU DD (now finalised as 2012 CEU DVC) which provides a range of victim rights to be ratified into the domestic criminal procedure of member states. Although limited circumstances exist that do not allow for the challenging of such a decision, where the police refuse to investigate in the first instance, or where charges are downgraded or subject to a plea-deal, *R v Killick* suggests that the consideration of human rights declarations and instruments on the domestic level is a key way through which victims are being granted significant access to justice in a way that is heretofore unprecedented. The ratification of victim rights through domestic processes means that such rights are made compatible and consistent with local rules regarding criminal law and procedure. This maintains the foundational right of the accused to a fair trial and ensures that the integration of victim interests occurs in a way that is consistent with the accused's right to due process and procedural fairness.

Prior to *R v Killick*, the High Court of England and Wales considered *R (On the application of B) v DPP* (2009) EWHC 106 (Admin), which reviewed the CPS's ability to discontinue prosecution with regard to the positive obligations placed on the UK under the ECHR, and as they apply under the *Human Rights Act 1998* (UK) and the jurisprudence of the ECtHR. Article 3 of the ECHR provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This carries the obligation to provide a legal system that adequately responds to violence (see Leverick 2004). The decision to discontinue prosecution for the offence of wounding with intent and witness intimidation was made on the assumption that the victim's mental illness would undermine his credibility as a witness. Lord Justice Toulson held at par [70]:

> The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB could be put before the jury as a credible witness, was to add insult to injury. It was a humiliation for him and understandably caused him to feel that he was being treated as a second class citizen. Looking at the proceedings as a whole, far from them serving the State's positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim's sense of vulnerability and of being beyond the protection of the law. It was not reasonably defensible and I conclude that there was a violation of his rights under Article 3.

The questioning of a decision of the police or prosecution to charge or proceed on indictment has long been identified as a question to be resolved in the public interest alone. The personal views of the victims are not part of the public interest. Although the Victims' Code and CPS guidance increasingly require victims to be kept informed as to charges brought, including charge bargaining or plea-deals reached, the decision to settle on a final charge or to not proceed with a charge has been preserved as that of the prosecution, acting in the public interest alone. However, the 2012 CEU DVC provides that member states be able to set a process to allow victims to seek review of decisions not to proceed with a prosecution. This falls against a background of the consultative rights of the victim in plea bargaining (Verdun-Jones and Yijerino 2002).

The Criminal Division of the Court of Appeal of England and Wales dealt with the victim's right to review under the 2011 CEU DD in the case of *R v Killick*. In 2006, two men suffering from cerebral palsy informed police of anal rape and sexual assault by the accused, Christopher Killick. Information was also received on a third complaint of non-consensual buggery. Killick also suffered from cerebral palsy, though to an extent considered to be less than the complainants. Killick was arrested and interviewed in 2006, and denied any form of sexual activity with two complainants and asserted that the anal intercourse with the third complainant was consensual. The CPS made the decision in 2007 not to prosecute. The victims then complained about the decision not to proceed against Killick, which resulted in a review pursuant to the CPS complaints procedure. The review concurred but by now the complainants had sought legal advice. Some three and a half years after the arrest a 'third tier' review by the CPS concluded that Killick could be prosecuted. However, by this time Killick has been informed in writing that he would not be proceeded against. Killick appeared in the Central Criminal Court in 2010. The defence requested that the proceedings ought to be stayed as an abuse of process but the court rejected this. The trial continued and Killick was convicted of buggery and sexual assault but acquitted of anal rape, and Killick was sentenced to 3 years imprisonment.

Considering the 2011 CEU DD, the Court of Appeal of England and Wales (Criminal Division) held in *R v Killick* that the 'decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance' (par 48). The Crown contention was that the victims had no right to request a review of a decision not to prosecute, but could utilise the existing CPS complaints procedure.[4] In the context of common law procedure this was a correct statement of the power available to the victim. The prerogative to regulate criminal behaviour now lies with the Crown and state. However, in the context of the obligation to consider and where possible ratify instruments of the European Union, the Court of Appeal held that:

> [w]e can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor's decision. That

> right under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft European Union Directive on establishing minimum standards on the rights, support and protection of victims of crime dated 18 May 2011 which provides: 'Member States shall ensure that victims have the right to have any decision not to prosecute reviewed.' (*R v Killick* [2011] EWCA Crim 1608, par 49)

The only other alternative, other than existing CPS policy as to complaints, was for the victims to rely on the individual's right to seek judicial review in the High Court. High Court procedures make judicial review of a decision not to proceed with a charge difficult, with the judiciary reluctant to get involved in processes leading to the charging of suspects, a process widely accepted as an executive function. Relief would only be granted in the most exceptional cases where the internal policies of the executive, policies mandating a requirement by law, were not followed or defeated by a clear abuse of process. Seeking such relief would be expensive and thus prohibitive for many victims.

The Directive of the European Union 2012 (2012/29/EU) now sets out the process by which such tests ought to be made.[5] Following the release of an interim guidance, the Director of Public Prosecutions for England and Wales released the *Victims Right to Review Guidance* in July 2014 (CPS 2014). This guide explains the circumstances and procedures by which victims may seek review of a decision not to prosecute. The emergence of the victim's right to review is thus in policy guiding the CPS practice of complaints revision rather than as a statutory directive of Parliament. The CPS guidance (CPS 2014: 3) makes clear those circumstances that may give rise to the review mechanisms:

> The right to request a review arises where the CPS:
>
> (i) makes the decision not to bring proceedings (i.e., at the pre-charge stage); or
> (ii) decides to discontinue (or withdraw in the Magistrates' Court) all charges involving the victim, thereby entirely ending all proceedings relating to them;
> (iii) offers no evidence in all proceedings relating to the victim; or
> (iv) decides to leave all charges in the proceedings to 'lie on file'.

Where a decision not to proceed with a charge is made by the CPS, they will inform the victim of their decision to do so. This information will also specify whether the decision not to proceed is a qualifying decision, in that it is a decision which, with the victim's election, gives rise to the review mechanisms. The victim only need indicate that they seek review to initiate the review process. Once initiated, the CPS will conduct a local review. This review will be conducted by a new prosecutor who will be assigned to the case.

Where the victim's dissatisfaction with the original decision has not been resolved at the local level by a new prosecutor reviewing the original decision, they may complain further. This further complaint will initiate an independent review by the Appeal and Review Unit or by a Chief Crown Prosecutor, as may be appropriate. This review will consider the case *de novo* or as new, and will not use as a starting point the original decision arrived at. Only information available to the original decision-maker will be used in the appeals process. Any new information will need to be raised with the police.

Where a decision not to charge is overturned, the matter may be reinitiated in court. Where no evidence was offered to the court, and the review process realised that this should not have happened, redress is limited to an explanation and an apology. This is because the court has already discontinued proceedings. Alternatively, the original decision may be upheld and the matter concluded. Should the victim continue to be dissatisfied, the only option open to them is to utilise existing common law procedure and seek judicial review in court.

Committals

Where a matter is dealt with on indictment the usual process is to commit the accused to stand trial by determining that the evidence supports a prima facie case against them. The test is whether, following the presentation of the prosecution brief of evidence and the testing of any witness called by the prosecution or accused, there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence. A committal is also held to ensure that the prosecution's evidence has been disclosed to the accused, to allow for an

early guilty plea, or to provide a process to deal with other related matters. Where an accused is committed to stand trial, they will be arraigned in the Crown Court in England and Wales, or in the district, county, or supreme courts in the states and territories of Australia. The name and level of the court varies with the jurisdiction and charge. Trial courts in the USA also vary depending on the jurisdiction, with federal offences being heard before the federal district courts and state charges heard in the state supreme courts. Canadian trial courts include the superior courts found in each province. Where committed to trial, an accused will appear before a judge and jury, unless the right to a jury trial is waived for a judge alone trial, where permitted. A matter will be dealt with summarily before a magistrate sitting without a jury where it is not dealt with on indictment. Some jurisdictions deal with matters in this way before a court of inferior jurisdiction, and names vary. See Chap. 4 for a discussion of the rights of the victim in the summary hearing process.

The testing of the evidence against the accused prior to committing the accused to stand trial has a history in grand jury indictments. The modern process is characterised by a magistrate sitting alone who will determine whether the prosecution presents a case to answer. However, the precursor to this power resides in the grand jury, which is still in use in certain US states. Where a grand jury process is retained, the jury determines whether a case to answer is made out on the evidence presented to it. If a case is established, the grand jury will return a true bill of indictment, and the accused will proceed to arraignment before the trial court. Most jurisdictions, including those in England and Wales, the states and territories of Australia, and in Canada, have abandoned grand jury indictment for a testing of the case by magistrate or judge alone.

While it is important that the prosecution presents enough evidence in order to establish a prima facie case, a committal hearing is not a trial, and it is important that the rights and interests of victims and witnesses are adequately protected during this phase. Whether the victim is required to participate in this phase depends on whether the accused intends to plead guilty or not, and whether the accused seeks to challenge aspects of the prosecution brief of evidence in order to undermine the prosecution's evidence such that the magistrate forms the opinion that there is no case to answer, and dismisses the prosecution case against them, discharging the accused from further proceedings. Where the prosecution hands up

their brief of evidence to the magistrate and the magistrate is satisfied that the brief contains sufficient evidence to convict the accused, the accused may enter a guilty plea, and the magistrate will commit the accused to be sentenced in the relevant court. The accused may also enter a plea of not guilty and elect to stand trial in the relevant court without further contesting the brief of evidence at committal. Where this occurs there is no need to call witnesses, including victims, to the committal. However, should the accused contest the brief of evidence, they may seek to call witnesses and to cross-examine them against their statement in the brief of evidence.

The right to call a witness and cross-examine them is, however, protected by law and the accused does not possess a direct right to cross-examine a victim without leave of the court. Certain classes of sex offences victims, specifically child victims and those victims that are cognitively impaired, may not be called at committal. Where a witness is required to attend, a magistrate will call a witness where both prosecution and defence agree that the witness should be called. Otherwise, the magistrate exercises discretion to call the witness.

Section 91 of the *Criminal Procedure Act 1986* (NSW) sets out the relevant provisions regarding the calling and cross-examination of witnesses:

> s 91 Witness may be directed to attend
>
> (1) The Magistrate may direct the attendance at the committal proceedings of the person who made a written statement that the prosecution intends to tender as evidence in the committal proceedings. The direction may be given on the Magistrate's own motion or on the application of the accused person or the prosecutor.
>
> (2) The Magistrate must give the direction if an application is made by the accused person or the prosecutor and the other party consents to the direction being given.
>
> (3) In any other circumstance, the Magistrate may give a direction only if satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.
>
> (3A) A direction may not be given for the reasons referred to in subsection (3) if the written statement has already been admitted in evidence. This does not prevent a direction being given merely because the written statement is tendered to the Magistrate for the purpose of determining an application for a direction under this section.

(4) The written statement may be admissible in evidence in the proceedings after the direction is given if:

(a) the accused person and the prosecutor consent to the statement being admitted, or
(b) the Magistrate is satisfied that there are substantial reasons why, in the interests of justice, the statement should be admitted.

(5) A direction given on the application of the accused person or the prosecutor may be withdrawn only:

(a) on the application, or with the consent, of the applicant, or
(b) if the applicant fails to appear, on the application of the other party.

(6) The regulations may make provision for or with respect to the determination of substantial reasons under subsections (3) and (4).

(7) If a person attends to give oral evidence because of a direction under this section, the Magistrate must not allow the person to be cross-examined in respect of matters that were not the basis of the reasons for giving the direction, unless the Magistrate is satisfied that there are substantial reasons why, in the interests of justice, the person should be cross-examined in respect of those matters.

(7A) A direction may not be given under this section so as to require the attendance of the complainant in proceedings for a prescribed sexual offence if the complainant is a cognitively impaired person (within the meaning of Part 6 of Chapter 6).

(8) A direction may not be given under this section so as to require the attendance of the complainant in proceedings for a child sexual assault offence if the complainant:

(a) was under the age of 16 years:

(i) on the earliest date on which, or
(ii) at the beginning of the earliest period during which, any child sexual assault offence to which the proceedings relate was allegedly committed, and

(b) is currently under the age of 18 years.

While witnesses may be called and cross-examined, the general rule is that direct victims will not be required to attend and be cross-examined

unless there are special reasons in the interest of justice. Section 93 of the *Criminal Procedure Act 1986* (NSW) sets this out as follows:

> s 93 Victim witnesses generally not to be directed to attend
>
> (1) Despite section 91 (other than subsection 8 of that section), in any committal proceedings in which the accused person is charged with an offence involving violence, the Magistrate may not, under that section, direct the attendance of an alleged victim of the offence who made a written statement (even if the parties to the proceedings consent to the attendance) unless the Magistrate is satisfied that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence.

Only where an accused person is charged with an offence involving violence can a magistrate require a victim to attend a committal in New South Wales. Section 94 of the *Criminal Procedure Act 1986* (NSW) prescribes that offences of violence include certain prescribed sexual offences, attempted murder, assault occasioning grievous bodily harm or wounding, robbery, and abduction and kidnapping. However, pt. 5, div. 1 of the *Criminal Procedure Act 1986* (NSW) sets protective restraints on the provision of evidence from victims of prescribed sex offences and this applies to committal proceedings. Part 6 of the same Act also sets out protections for vulnerable victims. Chapter 4 examines these processes as they apply to the criminal trial.

Victims do not possess a right of participation in committal hearings. Some jurisdictions have moved to strictly limit or remove the right to cross-examine the victim during committal. In South Australia, under s 106 of the *Summary Procedure Act 1921* (SA), a magistrate must be satisfied that there are 'special reasons' before requiring a witness to attend to be cross-examined. Other jurisdictions have abolished committals altogether. Western Australia followed the recommendation of the Law Reform Commission of Western Australia (LRCWA) that preliminary hearings ought to be abolished out of, among other things, the desirability of limiting the number of times that victims and witnesses may be called to give evidence (LRCWA 1999: 245). New Zealand has also abolished committal hearings, although applications may still be made

for an oral evidence order from the trial judge pursuant to ss 90 and 92 of the *Criminal Procedure Act 2011* (NZ). This order will only be granted where the accused elects to proceed by way of jury trial, and where the victim's evidence is determined to be necessary to resolve a pre-trial issue.

Pre-Trial Discovery and the Victim's Right to Counsel

The movement toward a more formalised policy of the right to review is supported by a broader albeit rarely used common law power to challenge pre-trial decisions. The power to appoint private counsel to act against the accused independently of the state in the criminal prosecution process is now being supported by a movement toward the ratification of charters or declarations of rights that are at least partly enforceable, granting victim's access to substantive provisions and rights, in certain jurisdictions.[6] The power of the police and prosecution to charge and make charge-related decisions, such as plea-deals, generally rests with the executive (see Verdun-Jones and Yijerino 2002).

Victims are generally unable to appoint counsel to challenge prosecution decision-making, except where decisions reached by prosecutors are in contravention of their own policy or guidance, or where provided for by statute.[7] However, the victim does have the power to challenge certain pre-trial decisions that affect their dignity or privacy. This includes situations where the accused seeks discovery of information or evidence from the victim that would be of questionable probative value to the court. Access to confidential counselling notes provides one situation where a victim may appoint counsel to oppose discovery, which usually occurs during the pre-trial phase. They may do this on the basis that the information contained in such notes would be of little use to the Crown or accused, and would otherwise exacerbate trauma to the victim.

Section 299A of the *Criminal Procedure Act 1986* (NSW) makes specific reference to the protections afforded to victims of sexual offences and their standing in criminal proceedings. A protected confider is defined as a victim or alleged victim of a sexual assault offence by, to, or about whom a protected confidence is made. A protected confidence refers to

a counselling communication that is made by, to, or about a victim or alleged victim of a sexual assault offence. Section 299A provides:

> A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider.

The power to compel production of confidential counselling notes is made under s 298 and provides that 'except with the leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings' (cf. Canadian Criminal Code, RSC 1985 C-46, ss 278.1–278.91; Federal Rules of Evidence 28 USC art. IV § 412(a)–(c)). *KS v Veitch (No. 2)* (2012) NSWCCA 266 (also see *PPC v Williams* [2013] NSWCCA 286) provides a clear case example where private counsel were engaged to challenge the discovery of counselling communications that should otherwise be protected. In such cases, private counsel are included as third parties, with the Director of Public Prosecutions watching the brief and the Attorney-General intervening, but otherwise not participating in the hearing. Justice Basten refers to the rights of the victim in the context of such challenges:

> The person being counselled, if the victim of the alleged offence, is referred to as the 'principal protected confider' and, though not a party to the criminal proceedings, may appear in those proceedings 'if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider': s 299A. (*KS v Veitch (No. 2*) [2012] NSWCCA 266, [22])

In *KS v Veitch (No. 2)*, the issuing of the subpoena was found to be in contravention of the substantive tests under s 299D, and leave to grant the subpoena was not granted. The materials sought should have never been discovered in the first instance and the NSW Court of Criminal Appeal ordered that documents already handed to the trial judge, though

not passed on to the defence, be returned to the hospital caring for the victim.

The United States Code (USC), Federal Rules of Evidence 28 USC art. IV § 412(c), provides similar protections and right to counsel:

> Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
>
> (c) Procedure to Determine Admissibility.
>
> (1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:
>
> (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
> (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
> (C) serve the motion on all parties; and
> (D) notify the victim or, when appropriate, the victim's guardian or representative.
>
> (2) *Hearing.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

In *United States v Stamper* (1991) 766 F Supp 1396 (WDNC 1991), the district court ruled in a pre-trial evidentiary hearing that counsel for 'all three parties' were able to examine witnesses, which included the victim.

In Ireland, the *Sex Offences Act 2001* permits a sex offenses victim to retain counsel to challenge applications for the use of evidence that may establish the sexual history of the victim. However, changes to criminal procedure and the law of evidence in Scotland provide a basis for allowing victims to retain counsel beyond the immediate hearing for discovery of evidence of sexual history. The introduction of counsel for victims of sexual assault in Scotland is supported by changes made by the *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* and the *Vulnerable Witnesses (Scotland) Act 2004*. These acts provide recognition for sex offenses victims and limit the extent to which such victims may be cross-examined on character or sexual history. This creates an opportunity for independent legal representation for victims in the pre-trial

phase with regard to applications for pre-trial discovery (see Raitt 2010, 2013). The *Victims and Witnesses (Scotland) Act 2014* furthers the initiative to support victims by providing protections for child and vulnerable victims during trial. However, in contrast to those jurisdictions that limit counsel to pre-trial hearings regarding discovery of confidential character or sexual history evidence, the reform of criminal procedure in Scotland may present the opportunity to allow independent legal representation beyond the pre-trial phase, to support vulnerable witnesses during the trial proper (cf. Hoyano 2015: 119).

Consideration of the introduction of counsel for victims as third parties may thus be further justified by the creation of new procedures for the protection of vulnerable victims under the 2014 Act.[8] Considering such proposals, Chalmers (2014: 186; also see Munro 2014: 158–160) remarks that such counsel would not be equal to the prosecution and defence, but that legal representation would fulfil a function comparable to alternative common law jurisdictions:

> As this makes clear, what is contemplated here is not any sort of status as an equal party with the prosecutor; it is instead a right to make representations at certain specific points. It bears similarities to the limited rights to representation which have been recognised in Canada (in respect of disclosure of personal records) and Ireland (in respect of applications to lead sexual history evidence).

Braun (2014) has argued that legal representation for sexual assault victims need not compromise the accused by aligning with the prosecution, requiring the accused to then answer against multiple adversaries. Rather, the victim's right to substantive relief is qualified as a private right that need not affect the Crown case nor the accused's ability to answer the Crown case at trial (other than potentially failing to secure the counselling notes of the victim) due to the matter being heard as an interlocutory motion. Braun (2014) argues:

> … the suggested narrow form of legal representation for sexual assault victims does not infringe upon the procedural rights of the defendant. The legal representative of a sexual assault victim in the suggested form cannot exercise the same rights the parties can, but is limited to exercising some

> rights in relation to the protection of the victim witness at trial. For this reason, the defendant does not face the risk of a victim's legal representative aligning with the prosecutor and having to confront two adversaries. (Braun 2014: 829)

From 2011, where confidential records are subject to subpoena, New South Wales provides victims access to publicly funded legal representation. Legal Aid NSW hosts the Sexual Assault Communication Privilege Service, granting victims access to counsel and advice when their confidential records are subject to a discovery action. Rights of appeal with regard to confidential counselling communications are covered in Chap. 6.

Victim Rights in the Pre-Trial Process

Although police and prosecution involvement in the pre-trial process render this phase of the criminal trial within state control, victims are increasingly afforded service and procedural rights. However, certain states recognise a victim's right to participation in a way that can be characterised as an enforceable right. This includes those states that allow a victim to seek counsel to challenge the discovery of confidential evidence against an accused, to consult with the prosecution during charge negotiations, as occurs in South Australia and the federal courts exercising jurisdictions under the USC. England and Wales have ratified in policy the 2012 CEU DVC, the right review, by promulgating CPS guidance following *R v Killick* (2011) EWCA Crim 1608. Ireland is moving toward enforceable rights in bail applications, and victims can now raise concerns through a police representative as to any anticipated interference should an accused person be granted bail. While committals are still conducted without the victim's right to counsel or their input into prosecution decision-making, various protections are afforded for sex offences victims and most jurisdictions restrict the ability to cross-examine victims without leave of the court, and only if the interests of justice require their attendance. Increasingly, however, jurisdictions are providing enforceable rights for victims across pre-trial processes and this is transforming the pre-trial phase of the adversarial criminal trial process.

Where states have not moved toward enforceable rights for victims they have tended toward increasing service level rights to information and procedural rights to meet with the police or prosecution. The movement toward enforceable rights in the pre-trial phase develops out of service and participatory rights as demonstrated through the victim's continued power of arrest, to be assisted by the police for particularly vulnerable victims such as occurs with domestic violence, to seek information and to consult with police during the investigative and charging process (CPS 2013c), to have relevant issues raised during bail hearings, and to seek information and be kept informed of plea-deals reached (CPS 2013a, b). However, some states are shifting toward enforceable rights in areas largely otherwise constituted by service and procedural rights. South Australia and the USA under its USC are examples of jurisdictions that have moved toward the right to consult or confer with the prosecutor or state attorney with regard to decisions reached, including plea-deals with the accused. While the case record from the USA demonstrates that this right to consult does not grant victims the ability to take over or control proceedings, it does grant victims relief where they have otherwise been excluded from the decision-making process. At the very least, rights to consultation afford victims more than the right to be kept informed, and would require the prosecutor to listen to the concerns of the victim, even if the final decision arrived at is made in the public interest. The pre-trial process is therefore characterised increasingly as one that is moving toward substantive and enforceable rights for victims, and this is modifying our understanding of the adversarial trial process as exclusive to the state and accused.

The movement toward a more formalised policy of the right to review is consistent with the promulgation of victim rights and interests through human rights instruments and frameworks. This is what Elias (1985) identified as the third wave of victim rights—the expression of the rights of victims not as a manifestation of welfare policy on the local level but as rights available to all persons, everywhere. While *R v Killick* demonstrates that such rights may not become meaningful for the victim until they are given local context by consideration by the courts (or parliament), the case does show how international norms for the treatment of victims may come to modify criminal law and procedure identified as excluding the

victim under an adversarial model (see Verdun-Jones and Yijerino 2002). Although the right to request a review of a prosecution decision is limited in terms of the CPS guidance, the articulation of a policy that now guides CPS decision-making in the first instance is an important milestone for victims in their integration into a system of justice that otherwise ill affords victims' rights that can be enforced against the state.

The careful integration of victim rights and interests has resulted in policy reconsiderations that challenge the state's exclusive access to crime and justice. This has resulted in the reconsideration of the way victims may be better integrated into proceedings in light of the state's need to prosecute crime, and the accused's need to access a trial process that lets them fairly test the state case against them. *R v Killick*, the 2012 CEU DVC, and the *Victims Right to Review Guidance* provide an apt case study of the way in which victim rights may be appropriately considered against the state's need to continue to prosecute offences in the public interest. While the views of victims are considered, those views do not determine the outcome and must be weighed against the public interest at all times. As such, although the victim is given substantive rights of participation that may be enforced against the state, those rights never become determinative of an outcome nor usurp the state's right to prosecute. The removal of the process of review from the courts also ensures that the rights of the victim are not conflated with the rights of the accused in the trial context. The accused retains the right to challenge the Crown case without the victim acting as a third party to proceedings, should the matter be brought to court.

The processes traced in this chapter demonstrate that the movement of victims toward enforceable, substantive rights is occurring on a local level through the ratification of human rights instruments and directives, as encouraged and supported by grassroots local movements calling for change. As such, the integration of victims, especially where victim rights are determinative against the state, must work around existing powers that grant the accused a fair trial, and the state's prerogative to administer the criminal justice process as a sovereign process. Pre-trial processes now increasingly present opportunities of policy transfer and change through the consideration of human rights instruments, policy transfer between jurisdictions, and the political imperative to take note of and listen to victim issues, on the local level.

Notes

1. A 'victims' right to review scheme' at police level was implemented as of 1 April 2015 'for all National Recording Standard Offences'. City of London Police, Victims' Right to Review Scheme.
2. Sex offences generally require the cooperation and participation of the victim as a witness during the trial phase. Unlike other offences, which may be established on physical or forensic evidence alone, sexual offences often require the victim's testimony as to the lack of consent or acknowledgment of the numerous acts of sexual touching that found the counts on the indictment. For sex offences, it is not uncommon for there to be multiple counts between acts of indecent or sexual assault, or rape.
3. See Chap. 8 regarding the enforceability to charters and declarations of rights. Although generally non-enforceable, there are exception and limited grounds for enforcement through the Office of Commissioner of Victims' Rights.
4. Although characterised as a complaints procedure, the CPS process does not need to involve dissatisfaction with any particular prosecutor, but may be invoked where a questionable decision has been reached.
5. See art. 11 of the Final Directive of the EU 2012/29/EU. Also see cl. 43 of the preamble: 'The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position.'
6. See section on powers available to Commissioners of Victims' Rights.
7. See *R v DPP, Ex parte C* (1995) 1 Cr App R 136; *Maxwell v The Queen* (1996) 184 CLR 501; also see s 35A *Crimes (Sentencing Procedure) Act 1999* (NSW) as to consultative rights between police and victims where further charges are taken into account upon sentencing.
8. See Chap. 4 regarding the modification of trial rights for child and vulnerable victims.

3

Alternative Pathways: Restoration, Intervention and Community Justice

Restorative Intervention in Court Processes

The emergence of alternative pathways to justice, especially for offences heard in lower courts constituted by a magistrate, has been an instrumental development relocating the victim into the criminal trial process. This chapter will trace those developments, which have provided victims a role in restorative processes that now replace the trial altogether, or substitute for custodial or more onerous non-custodial terms, in the sentencing process. The procedural aspects of pre- and post-sentence intervention demonstrate how the availability of restorative programs across various phases of the traditional criminal trial process modify how we understand proceedings in the local and Magistrates' courts. Although certain sex, firearm, or especially violent offences may be excluded, depending on jurisdiction, most public order, property, motor vehicle, or offences of interpersonal violence are included.[1]

The programs available generally include those that divert offenders from the court system altogether, such as Youth Justice Conferencing, those that involve an alternative to the sentencing process, requiring the offender to appear before an assembly of justice stakeholders, such as

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Forum and Circle Sentencing, and intervention programs available as final sentencing options requiring participation in a community justice program for making amends. This latter category crosses various intervention programs including those for graffiti control, serious traffic offenders, those combating drug addiction, community work, or work for the victim or the offering of an apology. The rise of problem-solving courts, such as neighbourhood or community courts, will also demonstrate the movement away from traditional approaches to justice for alternative solutions that often integrate the victim into court processes in novel and innovative ways. Although not all intervention programs connect the offender with the victim, many modes of intervention are justified on the basis of inviting participation from the victim as a key aspect of the restoration of the offender (Morris 2002; Van Ness 2003).

The empowerment of the victim in sentencing is further evidenced by the inclusion of victims in intervention programs that seek to restore the offender and the victim. The victim is able to exercise more direct powers by participating in intervention programs and hearings because they are participating in those hearings directly (see Van Camp and Wemmers 2013; van Dijk 2013). In this way, victims have the ability to affect the outcome of intervention proceedings relevant to an offender. Progress toward the successful completion of such programs, where relevant and available to a particular offender, is then factored into sentencing orders made by the court. There are several intervention and restorative justice programs that invite participation from the victim directly. Forum and Circle sentencing provide a role for the victim in the sentencing process where the offender has committed an eligible offence, entered a guilty plea, and offered a willingness to be sentenced before the Circle or Forum. Young offenders may participate in a Youth Justice Conference as a diversion from court proceedings altogether, where offenders meet with the victim should they seek to participate in the conference.

The distinction between pre- and post-sentence intervention is important in terms of understanding the way in which restorative justice augments traditional court processes and proceedings. This is relevant to an analysis of the way in which restorative justice should be conceptualised within the existing criminal trial process. Rather than be identified as an adjunct to the trial, restorative processes are increasingly seen as main arena for the meting out of justice (see Braithwaite 2003). This occurs because

the engagement of the various participants, the offering of the contrition of the offender, understanding from the victim, and the willingness to take responsibility and offer a remedy to the victim where possible, meet the requirements of justice in the traditional hearing and sentencing process. As such, rather than be identified as supplementary to normative court process, restorative justice proceedings are increasingly cited as mainstreaming the justice process for offenders and victims alike.

Other participants in traditional courts processes are also influenced by this change. Forum and Circle Sentencing and Youth Justice Conferencing now require the magistrate, police prosecutor, and defence lawyer to participate as part of a conference or circle, rather than in opposition to the offender in an adversarial context. The reformulation of the traditional stakeholders of justice is an important point of departure for restorative models of justice. However, the connection of these stakeholders to traditional court processes also allows for important points of connection to normative trial processes that ascribe legitimacy and authority to restorative intervention. The rise of international courts and tribunals provides access to justice in a way that readily connects the victim with trial processes. International law and procedure thus suggest that restorative interventions need not be separated from the business of the court (Pena and Carayon 2013; for commentary on youth offending generally, see Christie 2015).

The development of problem-solving justice in the context of neighbourhood or community courts provides a case study as to the reformulation of service provision, the representation of victim and offender interests, and the role of the traditional court structure that separates itself out from service provision. The Neighbourhood Justice Centre in Collingwood, Melbourne, provides an example of the reconsideration of traditional boundaries between stakeholders, services, and the courts on a domestic basis.

Intervention, Deferral and Rehabilitation

The basis of restorative justice and intervention as an alternative pathway to justice is cemented into the criminal process by its connection to existing criminal procedure.

This occurs on a legislative basis and has required the amendment of criminal procedure to make the alternative pathways and programs lawful alternatives within existing criminal procedure. Amendments have been made to the criminal pre- and post-sentencing criminal process, although the objects of restorative justice interventions address similar objects across the different phases in which an offender may be referred to them. The objects of restorative justice and intervention are noted in s 345 of the *Criminal Procedure Act 1986* (NSW) as follows:

(1) The objects of this Part are:

(a) to provide a framework for the recognition and operation of programs of certain alternative measures for dealing with persons who have committed an offence or are alleged to have committed an offence, and
(b) to ensure that such programs apply fairly to all persons who are eligible to participate in them, and that such programs are properly managed and administered, and
(c) to reduce the likelihood of future offending behaviour by facilitating participation in such programs.

(2) In enacting this Part, Parliament recognises that:

(a) the rights of victims should be protected and maintained in accordance with the Charter of Victims Rights set out in the Victims Rights Act 1996, and
(b) the successful rehabilitation of offenders contributes to the maintenance of a safe, peaceful and just society.

The objects of restorative intervention suggest that the rights of victims are central to the meting out of the program. While the victim is not always included by virtue of the type of offence committed, or because the victim is not willing to participate in a program, victim involvement has been identified as central to the outcomes of restorative justice and, where possible, the victim will be included.

Section 7 of the Victims' Code, Chapter 2, Adult Victims, Part A: Victims' Entitlements, provides rights for victims regarding access to restorative justice intervention. The section sets out the rights and duties owed to victims as follows:

> 7.3 Restorative Justice offers you an opportunity to be heard and sometimes to have a say in the resolution of offences. This can include agreeing activities for the offender to do as part of taking responsibility for their actions to repair the harm that they have done. Restorative Justice can provide a means of closure and enable you to move on, while providing an opportunity for offenders to face the consequences of their actions and to understand the very real impact that it has had upon others.

The procedural aspects of restorative justice are also emphasised in the Code:

> 7.6 Restorative Justice can take place whilst criminal proceedings are ongoing or after the conclusion of criminal proceedings as part of a sentence and it can be used as an out-of-court disposal. Where available, this will be led by a trained Restorative Justice facilitator who will take your needs into consideration and deliver services in line with recognised quality standards.

The legislation setting out the use of intervention programs in the court process also addresses the objects of restorative intervention in each phase. In England and Wales, these processes are addressed separately across the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) and the *Criminal Justice Act 2003* (UK). This section sets out the framework that provides for a separate process with clear objects toward the inclusion of the victim in restorative programs for the benefit of the offender.

Pre-Sentence

Restorative intervention during the pre-sentence phase of proceedings seeks to integrate the victim's voice into proceedings in a way that is generally not possible through normative court proceedings. By engaging victims early in the criminal process it provides a basis for direct participation that might otherwise be reserved for attendance as witness at a hearing, or by delivery of a personal statement during sentencing, if at all. Pre-sentence intervention and restorative justice allow the court to offer an offender a course of early intervention and rehabilitation that provides

an opportunity to address the harm caused in order to mitigate the final sentence to be handed down. *R v Annesley* [1976] 1 WLR 106 determined that the Crown Court has a discretionary power to adjourn sentence to make further determinations, and it is this discretionary power courts rely on to seek the outcomes of a restorative intervention for the purpose of determining sentence (see Collins 2015).

Despite this discretionary power, the *Crimes and the Court Act 2013* (UK) cements restorative intervention in the pre-sentencing process by amending the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) to allow for the court to defer sentencing to enable an offender to participate in a restorative justice activity. Section 1ZA is inserted as follows:

> s 1ZA Undertakings to participate in restorative justice activities
>
> (1) …
>
> (2) Any reference in this section to a restorative justice requirement is to a requirement to participate in an activity:
>
> (a) where the participants consist of, or include, the offender and one or more of the victims,
> (b) which aims to maximise the offender's awareness of the impact of the offending concerned on the victims, and
> (c) which gives an opportunity to a victim or victims to talk about, or by other means express experience of, the offending and its impact.
>
> (3) Imposition under section 1(3)(b) of a restorative justice requirement requires, in addition to the offender's consent and undertaking under section 1(3), the consent of every other person who would be a participant in the activity concerned.

This amendment requires those persons administering a restorative justice program pursuant to the new s 1ZA of *Powers of Criminal Courts (Sentencing) Act 2000* (UK) to follow any guidance issued by the Secretary of State in order to develop good practice delivery across such activities. The *Criminal Justice Act 2003* (UK) Sch 23 also provides for deferral, envisaging that such deferral may allow for reparative acts from offender to victim:

> cl. 1 Deferment of sentence

(1) The Crown Court or a magistrates' court may defer passing sentence on an offender for the purpose of enabling the court, or any other court to which it falls to deal with him, to have regard in dealing with him to:

(a) his conduct after conviction (including, where appropriate, the making by him of reparation for his offence); or

(b) any change in his circumstances;
but this is subject to subsections (3) and (4) below.

The *Crimes and the Court Act 2013* (UK) gave Crown Court judges, district judges, or magistrates the ability to defer sentencing to allow an offender to participate in a course or program of intervention to restore the harms caused by them (cf. *New Zealand (Sentencing) Act 2002* (NZ) s 24A). Where the victim and offender participate, the court may adjourn the matter to enable organisation and participation in a pre-sentence restorative justice program.[2] The introduction of the *Crimes and the Court Act 2013* (UK) ensures that restorative justice is available across the various phases of the criminal trial, and seeks to standardise the practice of pre-sentence intervention across England and Wales. Restorative justice intervention as a pre-sentencing option will only occur where there is a victim identified as a result of an offence, where the offender admits guilt, and where the offender, victim, and other relevant participants agree to participate in the restorative program or intervention.

A magistrate or judge has the discretion to recommend pre-sentence restorative justice where they feel it will benefit the victim and offender. The recommendation must be made in the interests of justice, with a view that participation in the program will benefit the offender and increase their likelihood of restoration for the purpose of mitigating the final sentence arrived at. Where persuaded in favour of pre-sentence intervention, a magistrate or judge will order that a restorative justice practitioner conduct a risk assessment to determine the accused's suitability to participate in the program. The pre-sentence report may also recommend that an offender participate in a restorative intervention, where it will be of benefit to an accused. The types of programs considered by the Ministry of Justice (2014: 6) include:

A victim-offender conference (sometimes called a face-to-face meeting or RJ conference): Involves a trained facilitator, the victim(s), the offender(s)

and supporters, usually family members. Professionals, such as social workers may also be involved. Such meetings might well conclude with an agreement for further steps to be taken, such as some sort of reparation but this is not mandatory. On some occasions it may be necessary and appropriate to consider live video or audio/telephone as a means of bringing parties together;

A community conference: Involves members of the community which has been affected by a particular crime and all or some of the offenders. This is facilitated in the same way as a RJ conference but it differs in that it can involve more people.

In-direct communication (sometimes called 'shuttle RJ'): Involves a trained facilitator carefully passing messages back and forth between the victim, offender and supporters, who do not meet. This can also be by recorded video, audio/telephone or written correspondence. This approach can lead to a face-to face meeting at a later stage.

The risk assessment will require an assessment of both offender and victim in order to determine whether they are suitable candidates for restorative intervention and whether the outcomes of restorative justice will be served by their participation in a conference or alternative restorative arrangement. Based on the recommendations of this assessment, the restorative justice practitioner and facilitator may recommend one of the forms of intervention, a conference, a community conference, or indirect communication.

Post-Sentence

Section 213 of the *Criminal Justice Act 2003* (UK) prescribed a supervision requirement as part of an offender's sentence that could be constituted as a form of restorative justice. This provision, now repealed, required:

s 213 Supervision requirement (repealed)

(1) In this Part 'supervision requirement', in relation to a relevant order, means a requirement that, during the relevant period, the offender must attend appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the officer.

(2) The purpose for which a supervision requirement may be imposed is that of promoting the offender's rehabilitation.

(3) In subsection (1) 'the relevant period' means:

(a) in relation to a community order, the period for which the community order remains in force,
(b) in relation to a custody plus order, the licence period as defined by section 181(3)(b),
(c) in relation to an intermittent custody order, the licence periods as defined by section 183(3), and
(d) in relation to a suspended sentence order, the supervision period as defined by section 189(1)(a).

Offenders are now sentenced to a rehabilitation activity requirement pursuant to s 200A of the *Criminal Justice Act 2003* (UK). The *Offender Rehabilitation Act 2014* (UK) amends the *Criminal Justice Act 2003* (UK) as follows:

s 200A Rehabilitation activity requirement

(1) In this Part "rehabilitation activity requirement", in relation to a relevant order, means a requirement that, during the relevant period, the offender must comply with any instructions given by the responsible officer to attend appointments or participate in activities or both.

(2) A relevant order imposing a rehabilitation activity requirement must specify the maximum number of days for which the offender may be instructed to participate in activities.

(3) Any instructions given by the responsible officer must be given with a view to promoting the offender's rehabilitation; but this does not prevent the responsible officer giving instructions with a view to other purposes in addition to rehabilitation.

(4) The responsible officer may instruct the offender to attend appointments with the responsible officer or with someone else.

(5) The responsible officer, when instructing the offender to participate in activities, may require the offender to:

(a) participate in specified activities and, while doing so, comply with instructions given by the person in charge of the activities, or
(b) go to a specified place and, while there, comply with any instructions given by the person in charge of the place.

(6) The references in subsection (5)(a) and (b) to instructions given by a person include instructions given by anyone acting under the person's authority.

(7) The activities that responsible officers may instruct offenders to participate in include:

(a) activities forming an accredited programme (see section 202(2));
(b) activities whose purpose is reparative, such as restorative justice activities.

(8) For the purposes of subsection (7)(b) an activity is a restorative justice activity if:

(a) the participants consist of, or include, the offender and one or more of the victims,
(b) the aim of the activity is to maximise the offender's awareness of the impact of the offending concerned on the victims, and
(c) the activity gives a victim or victims an opportunity to talk about, or by other means express experience of, the offending and its impact.

(9) In subsection (8) 'victim' means a victim of, or other person affected by, the offending concerned.

Should a magistrate or judge deem an offender to be suitable for restorative intervention or where a pre-sentence report is drafted and the offender is prima facie suitable for restorative intervention, the National Probation Service (NPS) will determine whether the offender is a suitable candidate for a post-sentence intervention program. This assessment will take a number of factors into account in order to increase the likelihood that an offender completes the program satisfactorily. These factors include the availability of a suitable program, supervision or coordination of the program, the willingness of the victim to engage with the offender, and the willingness of the offender to participate meaningfully. Where recommended by the NPS, a restorative intervention may then be ordered by the court as a component of rehabilitation an activity requirement under s 200A of the *Criminal Justice Act 2003* (UK). The extent to which the restorative intervention becomes a formal requirement of sentence, in that successful completion of the intervention is a strict requirement of sentence, is in the discretion of the court. Where an offender

by virtue of s 200A otherwise avoids a custodial term or serious non-custodial term, it is likely that a court would require successful completion of the objects of the restorative intervention to the satisfaction of the restorative justice practitioner.

Different agencies may recommend a restorative justice intervention. The prosecutor may seek advice from the NPS and police or victim services, who may in turn notify the CPS as to the suitability of restorative justice as a sentencing option. The victim or offender may seek a restorative justice activity as part of a rehabilitation activity requirement, which may be communicated to the court through the CPS or counsel for the accused. Where a restorative intervention is possible and practical in the circumstances of the case, a facilitator or restorative justice practitioner may make inquiries with the victim and offender before the sentencing hearing to determine whether there is a general willingness to participate and whether victim and offender are open to the objects of the program as part of a court ordered sentence. A lack of willingness on the part of either party would generally mean that restorative justice is unsuitable, unless an alternative program, conference, or means of participation in a restorative intervention can be found that is supported by the parties. The role of local restorative justice practitioners and facilitators are central to the success of the prospects of s 200A orders, as courts will generally be unwilling to order a restorative intervention unless they are satisfied that it will meaningfully contribute to the offender's rehabilitation. This will require the court to be notified of the details of the restorative intervention and its monitoring and reporting requirements.

Restorative interventions will generally be suitable where the offender is willing to plead guilty to the offence but otherwise is not limited to offenders who would likely receive a non-custodial term or community sentence. Offences with a high degree of seriousness that involve a high degree of interpersonal violence, or sexual offending, will generally preclude the offender. Domestic violence offending has also been identified by the Ministry of Justice (2014: 7) guidance as less appropriate for restorative justice, given the chance of ongoing violence and intimate modes of communication between victim and offender.[3] Hate crimes such as those involving vilification of a victim will also be less appropriate, unless the victim requests restorative intervention and a trained facilitator

known to be able to manage victim offender interactions in the context of such vilification is able to recommend intervention. However, restorative justice may be available for more serious offences, depending on the type of program available. The involvement of the victim is more likely to be inappropriate for offences involving sexualised offending, which may prove to be too personal and contentious for victim and offender to become engaged in a meaningful dialogue. Indeed, such interaction may promote secondary victimisation and thwart the basis of the engagement being restorative to the victim. For other offences, the commitment of the offender and victim to the objects of the intervention must be secured prior to any meeting. Those instances where the victim is open to restorative justice and specifically seeks out a restorative intervention are considered with priority.

Once a restorative justice intervention is ordered as part of an offender's sentence it is likely that the court will be informed of the progress of the offender and whether they satisfied the objects of the intervention. The facilitator or restorative justice practitioner will prepare a report for the court detailing the progress made and outcomes achieved. The outcomes of a conference or facilitated communication between victim and offender will often involve agreed outcomes that will specify further work that an offender will undertake to repair harm caused as a result of the offence (see Restorative Justice Council 2014: 11).

Diversion from Court: Youth Justice Conferencing

Youth Justice Conferencing is a diversionary program available where a young offender in NSW would otherwise be proceeded against in the Children's Court. Police have options available to them under the *Young Offenders Act 1997* (NSW) to warn or caution a young offender as an alternative to any court proceeding. Where the harm caused does not warrant a warning or caution, and where the offence complained of is suitable for conferencing, a young offender may be diverted outside of the criminal justice system.[4]

The *Young Offenders Act 1997* (NSW) grants police the power to warn a young person for minor, non-violent offences. The giving of a warning

is not dependent on any hearing or court, and can be given at any time or place. The offender does not have to admit wrongdoing or enter a plea. The police are required to record the details of the warning, specifically, the offence complained of, including the place of offence, the time, the offender's name, and their gender. It is the responsibility of the police issuing the warning that the young offender comprehends the earning issued. Multiple warnings are permitted, even for the same offence.

The *Young Offenders Act 1997* (NSW) also provides for a cautioning mechanism where the offender engages in more serious offending. Cautions differ from warnings in that the offender must admit to the offence and consent to the caution. An offender cannot be given more than three cautions albeit a single caution may cover multiple offences. Where the police seek to issue a caution they must consider whether the offensive behaviour is of the type identified as a cautionable offence, the overall seriousness of the offensive behaviour of the offender, the level of violence involved in the offence, harm done to the victim, and similar antecedent behaviour or a prior record of offending. The police retain discretion to issue a caution or proceed to conference, or court.

The police, an accredited youth worker, or the courts may issue a caution to a young offender. Representation may be present during a caution if the offender is under a welfare order or is on a probation or community service order. Representation may include any person responsible for the offender, a member of their family, an adult person chosen by the offender, a community member chosen by the offender, an interpreter, a social worker, or probation officer. The caution may include terms that require the offender to apologise to the victim, however, no other condition may attach to its issuing. The *Young Offenders Regulation 2010* (NSW) cl. 13 sets out the form and content of any victim statement to be supplied at the time of the drafting of a caution:

> cl. 13 Form and content of written victim statements
>
> For the purposes of section 24A (2) of the Act, a written statement from a victim:
>
> (a) must be legible, and may be either typed or hand-written, and
> (b) must be no longer than two A4 sized pages, and
> (c) must identify the victim or victims to whom it relates, and

(d) must include the full name of the person who prepared the statement and must be signed and dated by that person, and
(e) must include only the victim's description of the incident that is the subject of the caution and its impact on the victim, and
(f) must not have any medical, psychological or similar report attached, and
(g) must not contain anything that is offensive, threatening, intimidating or harassing, and
(h) must not contain a request for compensation or reparation.

In order to participate in a conference, a young offender needs to be charged with a serious offence that cannot be dealt with by way of warning or caution. This offence will ordinarily be heard before the Children's Court, although the conference is available as an option to divert the offender from court. The types of offences that may be diverted will ordinarily involve more serious offences with violence. However, the most serious offences such as homicide and serious sexual offending cannot be diverted. Before a conference can be held, however, the offender must admit to the offence and consent to a conference being held. A specialist youth officer is required to certify that the matter is one that ought to proceed by way of conference, the matter being too serious to proceed by way of caution. Section 37(3) of the *Young Offenders Act 1997* (NSW) provides the basis for such determination, which includes reflecting on the harm occasioned to the victim:

(3) In considering whether it is appropriate to deal with a matter by conference, a specialist youth officer is to consider the following:
    (a) the seriousness of the offence,
    (b) the degree of violence involved in the offence,
    (c) the harm caused to any victim,
    (d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act,
    (e) any other matter the official thinks appropriate in the circumstances

Where proceedings have commenced against a young offender, the DPP or court may refer an offender to a conference. The court has the power to

do so even if the offender has been found guilty of the offence in court. The DPP must consider various issues in making any such recommendation, specifically, the seriousness of the offence, the degree of violence involved in the offence, the harm caused to any victim, the number and nature of any offences committed by the offender, and the number of times the child has been dealt with under the *Young Offenders Act 1997* (NSW), or any other matter the DPP or court thinks appropriate in the circumstances.

The conference will take place in a less formal setting and non-threatening environment. This will mean that venues associated with the police or courts will be excluded, and the conference convener is likely to choose a community hall or something similar to accommodate the participants. Section 47 of the *Young Offenders Act 1997* (NSW) sets out the prescribed participants in the conference:

> s 47 Participants in conferences
>
> (1) The following persons are entitled to attend a conference:
>
> (a) the child the subject of the conference (whether or not the child is in custody),
> (b) the conference convenor,
> (c) a person responsible for the child,
> (d) members of the child's family or extended family,
> (e) an adult chosen by the child,
> (f) an Australian legal practitioner advising the child,
> (g) the investigating official,
> (h) a specialist youth officer,
> (i) any victim or a person chosen by the victim as a representative of the victim,
> (j) a support person or persons for any victim,
> (k) if the conference convenor, child, any victim and (if present) a person responsible for the child all consent, one police officer for the purpose of training the officer.

The conference will proceed by introduction from the convener or facilitator who will also introduce the parties and their roles. The incident leading to the establishing of the conference will be discussed with a view to disclosing agreed facts to which the young offender admits

responsibility. This will often centre on the harm occasioned the victim, whether or not they are in attendance. The victim may seek to explain the harm caused to them from their perspective, as an elaboration of the agreed facts. The consequences of the offence for the victim, ongoing harm and trauma, will also be put to the conference. Often the victim will seek a further explanation as to why the offender committed the offence and why they were chosen as the victim of the offence. Victims may also value the conference because it is an opportunity to actually see the offender in a more personable context, to hear what the offender has to say about their offending, and the context of the offending in the life of the offender. The conference may also be the first time the victim views the offender in a personal context, as they may not have had the chance to see the offender during the commissioning of the offence, that is, the robbery happened so quickly the victim did not get a look at the offender. Thus, some victims will remain largely silent during the conference, and will only seek to participate to observe the offender and to hear the offender's show of contrition. This level of participation may still be quite valuable, as offenders often remark that the mere appearance before the victim causes higher levels of anxiety than appearing before the police, a lawyer, or magistrate or judge.

The conference will also discuss a suitable outcome and the development of an outcome plan. This plan will contain conditions that may involve further reparatory work to allow the offender to make amends. This may involve work done or performed for the benefit of the victim. Section 52 of the *Young Offenders Act 1997* (NSW) sets out the prescribed outcomes, which grant the offender and victim the power to veto the outcome plan should it not suit them or their needs:

> s 52 Outcomes of conferences
>
> (1) The participants at a conference may agree to make such recommendations or decisions as they think fit. Any such decision that requires the compliance of the child is to be contained in the outcome plan agreed by the conference.
>
> (2) Before determining an outcome plan, the participants in the conference must give particular consideration to the desirability of the child's participation in an appropriate program, as referred to in subsection (5) (c).

(3) An outcome plan is, if possible, to be determined by consensus of the participants in the conference and, subject to subsection (4), may be agreed to by the conference even though it is not agreed to by all the participants.

(4) The child, and any victim of the offence who personally attends the conference, each have a right of veto with respect to the whole of an outcome plan, or with respect to any decision proposed to be contained in an outcome plan, regardless of the views of any other participant in the conference.

(5) Without limiting the kinds of decisions and recommendations that may be contained in an outcome plan, an outcome plan may provide for the following matters:

(a) the making of an oral or written apology, or both, to any victim,
(b) the making of reparation to any victim or the community,
(c) participation by the child in an appropriate program,
(d) the taking of actions directed towards the reintegration of the child into the community.

Juvenile Justice NSW sets out detailed guidelines for the management of conduct of conferences (Juvenile Justice NSW 2010). The guidelines state that diversion to attend a conference rather than proceed by way of traditional court proceedings is a progressive step for young offenders because the conference is able to do things that courts cannot. The conference provides a forum through which the rights of young offenders may be recognised in the context of the harm done to the victim. The support of the offender's family or community is also important as this allows the conference to get to the reasons for the young person's offending, and to discuss modes of intervention to address underlying issues and concerns. The opportunity to meet the victim and allow the victim to speak informally about the harm that has occurred to them is an important aspect of the conference and allows the offender to see the real consequences of their offending in a way that is generally removed or hidden by the formality of court appearances, and the need to act through counsel. The development of an outcome plan through agreement between conference participants is also an important outcome that allows harm to be repaired through consensus.

The outcome plan is drafted to meet the needs of each individual offender and victim. It may include unpaid work conducted by the offender for the victim, unpaid community work, returning stolen items or property, a verbal or written apology, enrolling in training or education, and may also include counselling. No further action will be taken against an offender when they complete the outcome plan. Where an offender does not complete the plan, they will return to police or court, and the matter will be proceeded upon as though no conference has occurred.

Making Amends: Graffiti Control

The *Graffiti Control Act 2008* (NSW) was introduced to help curb the rise in graffiti offences and to set out an option for court ordered clean-up of graffiti offending. While clean-ups do not always involve a specific victim, and may involve both public and private property depending on the offending, the 2008 Act is designed to accommodate the needs of individual victims as part of an order to encourage making amends to individual victims or the community generally. Although hampered by a lack of opportunity to engage in such orders out of the need to have work to perform that can be supervised and conducted in a way that is safe for the offender, the 2008 Act provides an innovative arrangement for making amends that potentially connects offender and victim.

The basis of community clean-up work surrounds the issuing of a nominal penalty for a graffiti offence. This generally includes a fine. Section 9B of the *Graffiti Control Act 2008* (NSW) now provides a mechanism to engage in community clean-up work to satisfy the fine imposed by a court. The Act states:

> s 9B Making of order for community clean up work
>
> (1) A court that imposes a fine on an offender for a graffiti offence may make an order requiring the offender to perform community clean up work in order to satisfy the amount of the fine.
>
> (1A) A community clean up order may be made:
>
> (a) on the application of the prosecutor or the offender, or
> (b) on the court's own motion.

(2) A community clean up order may be made by the court at the time that the fine is imposed or at a later time.

(3) A community clean up order may be made even if part of the fine has been paid (in which case it applies to the part of the fine that remains unpaid).

The total hours of clean-up work, which may be performed by an offender under the 2008 Act, is calculated at the rate of one hour for each $30 of the amount of the fine. The total number of hours must not exceed 300 h for adult offenders or 100 h for child offenders. Child offenders may serve their orders concurrently where multiple offences exist. The *Young Offenders Regulation 2010* (NSW) provides the outcomes of a community clean-up order where included as part of an outcome plan raised at conference. Clause 9 provides:

cl. 9 Outcome plans in respect of graffiti offences

(1) This clause applies to a child who admits to an offence covered by the Act that consists of:

(a) an offence against section 5 or 6 of the Graffiti Control Act 2008 or another crime involving graffiti, or
(b) damage to property by means of any graffiti implement (within the meaning of the Graffiti Control Act 2008).

(2) For the purposes of section 52 (6)(e) of the Act, an outcome plan for a child to whom this clause applies must provide for at least one of the following:

(a) the making of reparation for the offence, such as:

(i) the performance of graffiti removal work or, if such work is not available, community service work comparable to the performance of such work, and
(ii) the payment of compensation (not exceeding the amount that a court may impose on conviction for the offence),

(b) participation in a personal development, educational or other program,
(c) the fulfilment of any other obligation by the child:
(i) that is suggested by any victim of the offence who personally attends the conference, and
(ii) that is consistent with the objects of the Act.

(3) This clause does not limit any other matter for which an outcome plan may provide.

(4) This clause does not affect the requirements of the Act relating to the agreement of the child and victims of the offence to the outcome plan.

The limited basis of community clean-up work as part of a court sentence that converts a fine to a process of making amends to victims or the community, or as part of an outcome plan following a youth justice conference, provides a basis for the expansion of such orders as part of a restorative justice option for young offenders. This option also decreases the chance that a young offender will be fined without the possibility to satisfy the fine in the time allowed to pay it. This will decrease the number of young offenders who become fine defaulters, reduce enforcement proceedings against young persons, and limit the ongoing negative effects of fine default for young offenders. Furthermore, converting a fine to community clean-up work will provide a mechanism of restoring the offender in the context of community concerns of graffiti and the damage that may be done to private property and victims of crime.

Circle Sentencing

Although Circle Sentencing stands in place of a sentencing hearing in the Local Court, it is generally conceived as a mode of restorative justice and intervention. First implemented in Canada in 1992, Circle Sentencing is an alternative means to justice that recognises that the offender is Aboriginal with significant ties to their community, which may be fostered in developing a course of punishment that does not involve a full-time custodial term. The offender proceeds before a circle of people, specifically the offender, Aboriginal Elders from the community from which the offender identifies, the magistrate, the police prosecutor, the victim, the offender's legal representative or other support person. The circle is held in a less formal environment than would ordinarily occur were the offender to proceed before a court.

Circle Sentencing was piloted in 2002 in Nowra in the Shoalhaven, NSW. The pilot enabled adult Aboriginal offenders who entered a guilty plea or alternatively had been found guilty by a magistrate of the Local

Court to proceed to sentencing by way of Circle Sentencing. An evaluation of the pilot was undertaken by the Judicial Commission of NSW together with the Aboriginal Justice Advisory Council following the first 12 months of the pilot (Judicial Commission 2003). The number of matters assessed by the evaluation was limited to eight, given the limited area in which the pilot operated and the number of matters that were able to proceed to final sentence by the time the review was undertaken. The review deemed Circle Sentencing successful and the program was further extended throughout NSW. The Judicial Commission (2009: 51) report found that the pilot was beneficial for both victims and offenders, in the context of relocating the offender within the Aboriginal community:

> One of the aims of circle sentencing is to empower Aboriginal communities in the sentencing process. Clearly the current trial has achieved this – a considerable number of Aboriginal people from the Nowra community have been directly involved in circle sentencing both as victims and offenders, but also as Aboriginal community representatives, support people for victims and offenders, and service providers assisting in the implementation of sentences. The sentences that are developed are clearly developed as collaboration between the court and the local Aboriginal community, and are increasingly involving local community resources and elements of local Aboriginal culture. Local Aboriginal people are involved in supervising the sentences that circles have developed and the sentences are being crafted in ways to directly benefit local Aboriginal communities. The survey responses clearly indicate the circle process is actively recognising traditional Aboriginal authority structures in the local area and engaging those structures in sanctioning offenders and in attempting to reduce future offending.

In 2008, the Cultural and Indigenous Research Centre of Australia together with the NSW Bureau of Crime Statistics and Research conducted another review of the program (CIRCA and BOCSAR 2008). The CIRCA and BOCSAR (2008: 60) review found that:

> Based on the analysis, BOCSAR concluded that those participating in Circle Sentencing did not show a reduction in the frequency of their offending, that there was no significant difference between Circle Sentencing participants and the control group in time to offend, and that there was no significant difference between the treatment and the control

group in the percentage of offenders whose next offence was less serious than the reference offence.

However, it was noted that recidivism was only one of a number of variables by which Circle Sentencing may be measured and that the positive influence of the program on Aboriginal Elders, community cohesion, and victim participation in justice processes may be demonstrated by the program. Further research was recommended. Nevertheless, following the CIRCA and BOCSAR (2008) report, the program was further expended to several other locations throughout NSW. The New South Wales Law Reform Commission (NSWLRC) also recommended in its 2013 report on sentencing that the scope and operation of Circle Sentencing be expanded in order to reach a larger proportion of Aboriginal and Torres Strait Islander defendants (NSWLRC 2013: 362).

Following the CIRCA and BOCSAR (2008) report, the NSW government expanded the program and formalised Circle Sentencing in statute. The *Criminal Procedure Regulation 2010* (NSW) cl. 35 provides the objectives of the program as follows:

cl. 35 Objectives of the program

The objectives of the program are as follows:

(a) to include members of Aboriginal communities in the sentencing process,
(b) to increase the confidence of Aboriginal communities in the sentencing process,
(c) to reduce barriers between Aboriginal communities and the courts,
(d) to provide more appropriate sentencing options for Aboriginal offenders,
(e) to provide effective support to victims of offences by Aboriginal offenders,
(f) to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process,
(g) to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong,
(h) to reduce recidivism in Aboriginal communities.

The offences that allow an Aboriginal person to proceed before Circle Sentencing include summary offences and indictable offences that may

be dealt with summarily. However, offences including causing grievous bodily harm, drug supply, firearm, child pornography and prostitution, and stalking and intimidation are excluded. The NSW government introduced legislation in 2005 seeking to restrict participation in Circle Sentencing to those persons who would be likely to serve a custodial sentence (see cl. 36(e), *Criminal Procedure Regulation 2010* (NSW)).

The *Criminal Procedure Regulation 2010* (NSW) cl. 39 sets out the constitution of the circle:

> cl. 39 Constitution of circle sentencing group
>
> (1) A circle sentencing group for a referred offender must include the following persons:
>
> (a) the presiding Magistrate,
> (b) the offender,
> (c) the offender's legal representatives (unless the offender directs otherwise),
> (d) the prosecutor,
> (e) the Project Officer,
> (f) at least 3 Aboriginal persons (but no more than the maximum number of persons specified in the guidelines) chosen by the Project Officer, being persons who the Project Officer is satisfied belong to the Aboriginal community of which the offender claims to be part or with which the offender claims to have a close association or kinship.
>
> (2) A circle sentencing group convened by a Project Officer may (but need not) include the following persons:
>
> (a) any victim of the offender's offence who consents to participate in the group,
> (b) a support person for any such victim chosen by the victim,
> (c) a support person for the offender chosen by the offender,
> (d) any other person or persons chosen by the Project Officer, but only with the consent of the offender and, if a victim is participating, the consent of the victim.

The *Criminal Procedure Regulation 2010* (NSW) cl. 43 also provides recognition of the victim as a participant and provides that they be able to express their views about the offence and offender, thus:

> cl. 43 Victims to be heard
>
> If a victim agrees to participate in a circle sentencing group, the victim must be given an opportunity to express his or her views about the offender and the nature of the offence committed against the victim.

The *Criminal Procedure Regulation 2010* (NSW) cl. 31 provides for the procedure of the circle and for the process leading to the recommended sentence that the magistrate will hand down. This sentence may include a program participation order and intervention plan, which the offender must comply with in order to avoid being returned to court. The general process once the circle is convened includes a Welcome to Country by the Aboriginal Elders, followed by an introduction of members attending the circle, including their role and any relationship with the offender and victim. The magistrate may explain their role to the circle and any rules or guidelines that the circle must observe. The offence will be stated as agreed to by the offender. The offender may then make a statement addressing the offence. The victim or their representative may make a statement regarding the offence and its seriousness. Any harm consequent to them may be emphasised. The circle will then discuss the offence, the character of the offender, their contrition, the statement made by the victim, and what needs to now be done to redress the harm. Sentencing options may be discussed and the views of the victim and offender will be sought. The magistrate will then provide a summary and, once the circle has agreed to a recommended sentence, and the magistrate so agrees that it is a suitable and proportionate punishment at law, will proceed to sentence the offender. Support for the victim and offender may then be discussed and offered. Following the setting of review dates for participation orders or intervention plans, the magistrate will close the circle.

Forum Sentencing

Forum Sentencing, where the offender meets with the victim, the police, a facilitator, and other invited participants, is now commonly referred to as a conference.[5] Forum Sentencing is a process open to all offenders and

includes those charged with summary offences and indictable offences that may be dealt with summarily, although the same exclusions as relevant to Circle Sentencing, discussed above, apply. Clause 63(2) of the *Criminal Procedure Regulation 2010* (NSW) provides additional offences that exclude the offender, specifically, indictable-only offences including murder, manslaughter, or an offence involving sexual violence or serious interpersonal violence. Further, the offender may not have any prior convictions for the specified offences.

Where an offender is before the Local Court and where Forum Sentencing is deemed relevant and available, the offender proceeds to participate in a conference where they prepare an 'intervention plan'. A magistrate then approves this plan as part of the offender's sentence. An intervention plan may include an apology or reparation payment to the victim; work performed for the victim; participating in an education or rehabilitation program; or other measures to help offenders address their offending behaviour and reintegrate into the community. As the victim is invited to participate in the conference, any decision as to how to proceed to structure the intervention plan, and whether this will continue to involve contact between victim and offender, is made subject to the consent of the victim. If the offender fails to complete the program subject to the intervention plan, including anything promised or owed to the victim, the offender may be resentenced by the court.

The *Criminal Procedure Regulation 2010* (NSW) cl. 64 provides the measures that constitute Forum Sentencing:

> cl. 64 Measures that constitute the forum sentencing program
>
> The program is constituted by the following measures:
>
> (a) A participating court refers an offender for participation in a conference by making a forum participation order and the offender enters into an agreement to participate in the program.
> (b) A forum facilitator arranges a conference in respect of the offender.
> (c) A conference is held with the aim of determining an appropriate draft intervention plan for the offender. Any draft intervention plan arising from the conference is referred to the participating court.
> (d) If the participating court makes an intervention plan order, the offender completes the intervention plan to which the order applies.

Participants are generally required to be facing a custodial sentence or more onerous non-custodial sentence. Clause 63 of the *Criminal Procedure Regulation 2010* (NSW) provides:

> cl. 63 Eligibility to participate in program
>
> (1) A person is eligible to be referred by a participating court to participate in a conference only if:
>
> (a) the person is an offender, and
> (b) the court considers that the facts, as found by the court, or as pleaded to by the person, in connection with the offence, together with the person's antecedents and any other information available to the court, indicate that it is likely that a conviction will be recorded and that the person will be required:
>
> (i) to serve a sentence of imprisonment, including a suspended sentence or a sentence the subject of an intensive correction order or a home detention order under the Crimes (Sentencing Procedure) Act 1999, or
> (ii) to perform community service work in accordance with a community service order, or
> (iii) to enter into a good behaviour bond, and
>
> (c) the offender's case has been assessed as appropriate for being dealt with under the program in accordance with clause 60, and
> (d) the offender has been assessed as suitable for participation in the program in accordance with clause 60A, and
> (e) at least one victim of the offender has agreed to participate, or to have his or her nominated representative participate, in a conference, and
> (f) the court considers that, if it refers the person to participate in the program, it is likely that the person will enter into an agreement to participate in the program.

Clause 63 renders Forum Sentencing broader than Circle Sentencing. It is possible, for instance, for an Aboriginal offender, precluded from Circle Sentencing on the basis that they are otherwise likely to receive a more serious non-custodial term, to proceed to Forum Sentencing out of its broader remit. However, discretion may be exercised in favour of

Circle Sentencing for Aboriginal Offenders where a custodial term is a proportionate though less likely outcome.

The *Criminal Procedure Regulation 2010* (NSW) cl. 69 recognised the following participants:

> cl. 69 Participants in conferences
>
> (1) The following persons are entitled to participate in a conference:
>
> (a) the referred offender in respect of whom the conference is to be held,
> (b) the forum facilitator,
> (c) any victim of the referred offender or a person nominated by any such victim as a representative of the victim,
> (d) a police officer responsible for investigating the offence in respect of which the conference is proposed to be held or a person chosen by the police officer as a representative of the police officer,
> (e) any persons chosen by the referred offender as support persons for the referred offender,
> (f) a legal practitioner advising the referred offender,
> (g) any persons chosen by any victim of the referred offender as support persons for any such victim.

The process for participation in the conference begins with a suitability assessment order to ensure that the offender is open to the conference and any intervention that may result. The operations team will then contact the victim to determine whether they seek to participate in the conference, or whether they wish to be represented by another person. Should no victim wish to participate, either personally or by representative, the offender may not be able to proceed to conference. However, should the case be assessed as appropriate, and the offender deemed suitable for participation, the court may make a forum participation order should at least one victim or their representative seek to participate in the conference. Where a victim withdraws after initially seeking to participate, the offender will no longer be able to proceed to conference and court action will resume. Forum Sentencing thus centres the victim's consent to engage the offender in a conference as one of the main rationales of the program. However, where the victim does not seek to participate further, or where an offence is nominated where an individual victim may not be able to be located,

a victim representative from a professional organisation such as a victim rights or advocacy group will need to stand in their place.

The *Criminal Procedure Regulation 2010* (NSW) cl. 65A provides that the court must be notified should the victim withdraw from the conference:

> cl. 65A Victim withdraws consent to participate in conference or offender's case otherwise becomes unsuitable for program
>
> (1) The program manager must as soon as practicable notify the court that made the forum participation order:
>
> (a) if, at anytime after the order was made and before any conference in respect of the referred offender is concluded, the program manager forms an opinion (with reference to the guidelines referred to in clauses 60 (2) and 60A (2), as appropriate):
>
> (i) that the offender's case is no longer appropriate for being dealt with under the program, or
> (ii) that the offender is no longer suitable to participate in the program, or
>
> (b) if, at any time before a conference is held, all the victims of the referred offender who wished to participate, or have their nominated representative participate, in a conference withdraw their consent to participate.

Where the offender proceeds to conference, the participants will be encouraged to agree to an appropriate plan that allows the offender to make amends on their offending. They will do this under the guidance of the facilitator. Similar processes of introduction, discussion, and submissions from participants will generally precede the decision of the conference to a draft intervention plan.

The victim retains various powers to veto the draft intervention plan should it contain terms that are not suitable to them. The *Criminal Procedure Regulation 2010* (NSW) cl. 76 provides this as follows:

> cl. 76 Draft intervention plans
>
> (1) The participants at a conference may agree to make such recommendations as they think fit about the referred offender in respect of whom the

conference is held and include those recommendations in a draft intervention plan.

(2) Without limiting subclause (1), a draft intervention plan may provide for one or more of the following:

(a) that the referred offender apologise to any victim of that offender orally or in writing,
(b) that the referred offender make reparations to any such victim or the community,
(c) that the referred offender participate in a program aimed at improving that offender's prospects (for example, a counselling program, a drug or alcohol rehabilitation program or an education program),
(d) the taking of action directed towards the reintegration of the referred offender into the community,
(e) the times within which the plan is to be implemented.

(3) The participants may not include in a draft intervention plan a requirement that the referred offender carry out work in the community for a period that exceeds the period applying to community service orders under section 8 of the Crimes (Sentencing Procedure) Act 1999.

(4) A draft intervention plan is, if possible, to be determined by consensus of the participants in the conference and, subject to subclauses (5) and (6), may be agreed to by a majority of participants in the conference even though it is not agreed to by all the participants. In the absence of a consensus, a decision of a majority of the participants is a decision of the conference.

(5) The referred offender, and any victim of that offender who personally attends the conference, each has a right of veto with respect to the whole of a draft intervention plan, or with respect to any recommendation proposed to be contained in a draft intervention plan, regardless of the views of any other participant in the conference who is not a victim.

(6) A victim's right of veto does not operate unless all victims who personally attend the conference agree to the veto.

The referring magistrate will assess the draft intervention plan and should be it acceptable to the court, will make an intervention plan order. The *Criminal Procedure Regulation 2010* (NSW) cl. 80(2) provides a basis for feedback as to the satisfactory completion of the order:

(2) The operations team employee must notify the following as to whether or not the intervention plan is satisfactorily completed by the referred offender:

(a) the court,
(b) the forum facilitator,
(c) any victim of the referred offender,
(d) any police officer responsible for investigating the offence in respect of which that offender was referred to the program.

This victim will thus be informed of the satisfactory completion of the intervention order, which may include an apology to the victim, as well as other work to be performed for the victim or community as agreed by the participants of the conference and approved by the court. The victim may also wish to see the offender engage in a course of education or other outcome, and this will also be reported where made part of the intervention order.

Research undertaken by Rossner, Bruce, and Meher (2013: 1–2) on to the dynamics of what contributes to successful conferences under the Forum Sentencing program, indicates that conferences develop differently but may be grouped across three themes:

> The storybook forum is one where participants begin negotiations on the draft Intervention Plan from a starting point of consensus. They tend to actively work together to develop a plan that everybody appears happy with, and are marked by an exceptional level of shared understanding and feeling of goodwill. Polite forums do not achieve these high emotional resolutions – rather they are typically marked by a respectful dynamic, where participants are amicable and accept the plan. Drained forums are characterised in the following way: the goodwill generated in the early stages disintegrates as participants endlessly negotiate the fine points of the Intervention Plan. The forum loses momentum as participants become bored and restless.

Rossner, Bruce, and Meher (2013: 47) indicate that interviews with offenders who participated in a conference valued the opportunity to apologise to the victim and victims seemed to appreciate this. However, several participants noted that saying sorry was not the same as demonstrating contrition. Poynton (2013) found that there was no evidence

that offenders who go to conference under the Forum Sentencing model are less likely to re-offend than similar offenders appearing before a court. However, like Circle Sentencing, other factors may apply when determining the merits of Forum Sentencing, including the variability of outcomes across participants in the conference and the provision of new rights for victims that are otherwise granted limited substantive participation.

Problem-Solving and Community Justice

The rise of problem-solving justice is evidenced through the emergence of several initiatives that connect traditional access to justice to service delivery in support of the interests of multiple stakeholders. Traditional courts including the local or Magistrates' courts have not always supported offenders, victims, and witnesses with services that traditionally lie beyond determinations of guilt and sentence. Access to counselling, compensation, and welfare services may be provided through some Local Court venues. Increasingly, Local Courts may also provide a range of innovative restorative justice programs that connect victims and offenders with services in support of the offender's rehabilitation. However, the movement to problem-solving justice goes beyond housing services within the same building as traditional court venues, and utilising restorative intervention in the sentencing phase.

Problem-solving justice requires a significant restructuring of the workings of a court to connect stakeholders in new and different ways. Thus, the problem-solving courts of New York State demonstrate a commitment to delivering justice strategies in discrete areas of need where the judges of each court are versed in the specific types of problems faced by offender and accused, together with the types of help, support, and intervention available at each stage of the criminal trial. These courts often focus on known areas of risk within the criminal justice process. Rather than present as criminal courts of universal jurisdiction, problem-solving courts focus on specific issues the present particular issues for offenders and their victims. Domestic violence, mental health, young offenders, sex offences, drug dependency, and community justice issues are each dealt with by a team of professionals that include the judges that comprise each

court, court staff, specially trained counsel, medical and counselling personnel, and welfare service providers for both victim and offender.

This section focuses on the Neighbourhood Justice Centre in Collingwood, Melbourne. *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) established the Neighbourhood Justice Centre, which commenced operation in 2007. The Neighbourhood Justice Centre comprises a Neighbourhood Justice Court, which sits as a Magistrates' court with jurisdiction to hear all matters except committals and sexual offences, together with the criminal division of the Children's' Court, the Victorian Civil and Administrative Tribunal, and the Victims of Crime Assistance Tribunal. One magistrate is appointed to the Neighbourhood Justice Court, which is able to exercise the jurisdiction of any of the above courts or tribunals. The *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) amended the *Magistrates' Court Act 1989* (Vic) to establish the Neighbourhood Justice Division and provide for a problem-solving court under s 4M(5)–(7), as follows:

> (5) In assigning a magistrate to the Neighbourhood Justice Division, the Chief Magistrate must:
>
> (a) have regard to the magistrate's knowledge of, or experience in the application of, the principles of therapeutic jurisprudence and restorative justice; and
> (b) consult with the President of the Children's Court.
>
> (6) The Neighbourhood Justice Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the Sentencing Act 1991 and the proper consideration of the matters before the Court permit.
>
> (7) The Neighbourhood Justice Division must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to the parties to the proceeding.

Service providers are also housed within the Neighbourhood Justice Centre. These services include victims' support, mediation, specialised mental health, drug and alcohol treatment, counselling, housing support, employment and training support, Aboriginal and Torres Strait

Islander support services, and the provision of legal advice. Staff at the Neighbourhood Justice Centre are able to help offenders, victims, and witnesses locate services relevant to their matter, to prepare for their court appearance, to access support during their appearance as victim or witness, and to connect with corrections officers for the purpose of organising restorative justice interventions where ordered by the court.

The objects of the Neighbourhood Justice Centre set out its problem-solving remit. The Neighbourhood Justice Centre was established to provide a new approach to the old problem of offenders and victims not having access to the services they need in the one place. It also serves to provide a network of support and access to justice that would not otherwise be available. The benefit of this approach is that it forges new connections between stakeholders that provide pathways of communication to bring stakeholders together in new ways. The judiciary, court staff, counsel, corrections, and service providers would normally be housed in different buildings that geographically separate each area. Exacerbating this separation is the tradition of the courts being removed from the executive arm of government that administers and supervises sentences. Service providers would be removed further still, which may not connect to corrections, and most likely not connect to the courts at all.

The housing of each of the arms of the courts, justice administration and service provision in the one place encourages the development of a new approach to justice based on a shared understanding the role of each stakeholder. The development of this knowledge builds bridges between areas of justice that are traditionally separated, providing for the cohesive delivery of justice processes that can affect victim participation and satisfaction, and the recovery of offenders. This development of a knowledge base seeks to assist crime prevention by identifying and linking resources to respond to the causes of crime, by enabling providers to address disadvantage and support the local community. Increasing confidence amongst stakeholders by providing direct access to justice is one of the outcomes that also empowers local community members. Murray (2009: 82) sees this as a key characteristic of the Neighbourhood Justice Canter and its role in policy delivery and development:

> These guiding principles of therapeutic jurisprudence and restorative justice can typically shape neighbourhood courts in at least three key ways. Firstly, they enable neighbourhood courts to potentially experiment with less traditional curial methods to try to bring about more desirable legal outcomes. Secondly, neighbourhood courts are single-minded in their desire to attract judicial officers and community agencies that are able to serve the community and command its respect. The way the judicial officer interacts with defendants and develops supportive relationships becomes very important in this process as the dynamic between the bench and the community is reconceptualised. Thirdly, therapeutic jurisprudence and restorative justice can facilitate more problem-oriented and interdisciplinary approaches. In so doing, the neighbourhood courts are able to draw upon the support of the agencies linked with the court allowing it to undertake a broader policy role.

The Neighbourhood Justice Centre is also designed to help victims when they need to access justice. Victims are assisted when they need to attend court, and a separate entrance is provided so that victims need not come into unnecessary contact with the offender. The Neighbourhood Justice Centre also provides direct access to victim assistance and counselling. This is offered to assist victims and witnesses following a crime or as connected to court proceedings in order to better support victims and witnesses through proceedings. Victims will have access to specialised trauma counselling and advice on compensation claims. Associated services are also provided, specifically advice from police, legal advice, as well as housing and medical advice. Women dealing with domestic and family violence may seek specialty advice or intervention orders, accommodation and relocation services. The Victims of Crime Assistance Tribunal, also within the Neighbourhood Justice Centre, is able to make award payments to victims for counselling, medical, safety expenses following a crime, and for funeral expenses. Compensation for loss of income is also available to help victims overcome the effects of the offence. Awards may be made to encourage a victim's recovery but may also be made to recognise the level of injury occasioned by a victim, including the stress and trauma that result from crime. Chapter 7 provides further detail of victim's compensation and assistance as it applies to offences occasioned in like jurisdictions of NSW and the UK.

Restorative Justice in International Law and Practice

The rise of the ICC and the powers afforded to the victim under the Rome Statute together with the Rules of Procedure and Evidence has created an opportunity to consolidate a range of processes that grant victims closer contact to the criminal trial. While this contact spans pre-trial, trial, and appeal phases in the ICC, victims are granted rights of participation through counsel, with access to hearings by being able to make submissions, call evidence, and even examine witnesses. This is a significant departure from former international tribunals such as the ICTY and the ICTR, which did not grant victims any particular standing or role. Pena and Carayon (2013: 521) argue, however, that the ICC develops its restorative character by reference to earlier tribunals that sought to establish the truth of the violation of human rights:

> In this victim-centered or victim-oriented movement, the victim goes from the position of 'object' to that of 'subject.'. It is generally agreed that restorative justice comprises a series of principles and values that include not only reparation but also the participation of victims in redress processes, respect for victims' dignity and recognition of the victim and the harm suffered as a result of a crime. In that regard, parallels can be drawn between trials and other transitional justice measures, particularly truth commissions.

While the level of victim participation before the ICC has proven controversial (see Zappala 2010), it has raised the suggestion that the mode of participation permitted in the ICC is a form of restorative justice and therapeutic jurisprudence that affords victims substantive participation in the outcomes of the court.

The ICC may therefore be conceptualised as a model that encourages greater levels of victim participation in an international law model. Wemmers (2009, 2010) argues that the ICC represents a system of the integration of restorative justice principles within the practice and procedure of the criminal justice system. Chapter 1 traced the procedural

aspects of victim involvement in the ICC, in particular the role of counsel for victims, their capacity to submit evidence and to make submissions on law or evidence to the court, and to place on the record information that seeks to establish the truth of the matter. This mode of participation will also assist the court where reparations are sought.

The ICC model is therefore an integrative one that places victims within the context of the practice and procedure of the work of the court. This accounts for the controversial reception of the role afforded to victims, especially in light of the requirement of the court to recognise party status of the prosecution and defence but not victims, who are recognised as participants. Wemmers (2009: 416) has, however, argued that the criminal justice process as one founded on a dichotomy of state and defence interests, exclusive of the victim, fails to recognise the victim as a substantive participant, such that 'we need to begin to recognize that crime affects victims as well as society and that victims belong in the criminal justice system'. The Preamble of the Rome Statute thus places victims within the context of jurisdiction of the ICC in a way that few courts, even international courts, do:

> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.

The ICC model therefore presents an opportunity to characterise the criminal trial as one that incorporates restorative principles for victim participation and does this in a way that transforms the trial process into one where restorative justice is not identified as a matter of deferral from normative proceedings. Rather, the restorative aspects of victim participation are integrated and arguably constitutive of the ICC trial process itself. This is a significant conceptual shift from conceiving of the trial as one that affords a role for the victim as contained by discrete procedures, such as providing an opportunity to present an impact statement during sentencing, to one that includes the victim throughout. The risk of such general inclusion, however, is that the victim will detract from the trial process to focus on victim-related interests, neglecting the duty of the parties to effectively determine whether a crime has been committed in the first instance (see Damaška 2009).

Victims, Intervention and the Courts

The criminal trial is increasingly shaped by processes that depart from the hearing and sentencing of an offender in open court. Rather, courts utilise a range of restorative justice and intervention mechanisms to address the correctional needs of the offender with the aim of addressing underlying causes and issues of offending. The victim is central to this process. Although the extent to which the victim participates in restorative justice varies depending on the program and the desire of the victim to engage with the offender and justice process more generally, the participation of the victim and engagement of the offender meets several outcomes important to the justice system. This includes, amongst other outcomes important to the offender, police, and courts, the offer to the victim of a degree of substantive participation in justice by allowing victims to have an impact on the outcome of the offender's intervention. This installs the victim into the decision-making process in a way that extends well beyond their normative role of witness in court.

The transformation of court process to include restorative intervention has been seminal to the empowerment of victims in a criminal justice context. While intervention programs were always permitted as a matter of process, given the courts have the common law power to defer proceedings to make determinations, most jurisdictions now codify this power in a form that directly acknowledges the role of restorative justice in pre- and post-sentencing processes. Restorative justice may now be used to the benefit of both offender and victim from the time bail is determined. While this may increase the offender's chances of being granted bail and may minimise other conditions that would otherwise be required of the offender, the potential use of intervention early in the pre-trial process also provides a role for the victim in substantive decision-making. This role places the victim in the context of pre-trial processes that influence the decisions made by counsel and the court. Although the focus remains on the offender's capacity to address their offending by participation in an intervention program, the police prosecutor and counsel for the defence will consider the engagement and interaction of the offender and victim as part of any submission that deals with restorative interventions.

The movement toward restorative intervention is now well placed within local and Magistrates' courts. Indeed, the use of intervention orders during bail, as a pre-sentencing option, or as a condition of a bond, or as a sentence of itself, is now frequently used throughout the common law world. This may lead us to reconsider the Local Court as a place of justice characterised by a normative adversarial process. Instead, the Local Court is increasingly identified as a place of problem-solving justice and restoration. Although not all offenders and victims are able to participate in an intervention program, there are key connections between the work of the Local Court and the type of problem-oriented justice that places offenders and victims in a context of therapeutic services and assistance. Despite this, the movement toward problem-solving courts is best evidenced in the Neighbourhood Justice Centre in Collingwood, Melbourne. This is a community court modelled around the provision of services to meet the needs of locals, within the context of less formal access to a multi-jurisdictional court. Although the centre is not offered for the principal support of victims, rather supporting the community as a whole of which victims are members, several services are offered to meet the direct needs of victims.

The use of restorative principles in international law and procedure further reinforces the significant connection between restorative interventions and the practice and procedure constitute of the court in the first instance. As seen with the transformation of the local or Magistrates' court, the practice and procedure of the court need not exclude restorative principles, and the character of these lower level courts might be more appropriately characterised as hybrid adversarial courts. The rise of Circle and Forum Sentencing as constitutive of the sentencing phase of an otherwise adversarial process, one that now clearly includes restorative mechanisms to restore the offender within their community, establishes that the court is less adversarial. This characterisation of the court is due to the significant placement of the victim in the process of restorative intervention such that the various programs now available in such courts transform the way we identify these courts in accordance with the normative remit of a contest between state and offender alone.

Notes

1. Restorative interventions including those that involve the victim directly are explicitly recognised under the *Sentencing Act 2002* (NZ) s 10(4): 'Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn the proceedings until: (a) compensation has been paid; or (b) the performance of any work or service has been completed; or (c) any agreement between the victim and the offender has been fulfilled; or (d) any measure proposed under subsection (1)(d) has been completed; or (e) any remedial action referred to in subsection (1)(e) has been completed.'
2. Also see *Criminal Justice Act 2003* (UK) Sch 23.
3. See contra. Evaluation of the NSW Domestic Violence Intervention Court Model. Birdsey and Smith (2012) indicate that some but not all objectives of the court mode were reached.
4. For comparison, see recent amendments to the current scheme for youth referral in England and Wales under the *Criminal Justice and Courts Act 2015* (UK) ss 41–45. The Explanatory Notes indicate 'The offender must agree with the panel a contract of rehabilitative and restorative elements to be completed within the sentence. Where the victim and the offender consent, the panel can be used to deliver a restorative justice conference. A restorative justice conference offers victims the opportunity to be heard and to have a say in the resolution of offences, including agreeing restorative or reparative activity for the young offender.' (Stationary Office 2015: 53).
5. Participation in Forum Sentencing in NSW is available for adult offenders in Local Courts, where the court considers a conviction is likely and the offender will be required to otherwise serve a sentence of imprisonment (which may be suspended), an intensive correction order or home detention, perform community service work, or enter into a good behaviour bond. Eligible offences include: common assault; break and enter; malicious damage; drink driving; theft (shoplifting, possess stolen property, steal from employer); and fraud.

4

Trial by Jury

The jury trial has been largely modified by changes to the law of evidence. This chapter focuses on the way vulnerable victims are now protected by a law of evidence that strictly controls the accused's access to the victim during the trial, including the right to examine the victim in open court, the victim's right to out-of-court evidence, to court support, for retrials following acquittal, and for rehearing following appeal. This chapter also focuses on sex offences victims and other identified vulnerable groups where the criminal trial process has been significantly modified in order to protect the interests of the victim. This chapter focuses on the criminal trial proper. It covers the period following pre-trial decision-making but before the accused is sentenced. Although the interaction of the jury and victim is negligible in adversarial courts,[1] this chapter covers that phase of the criminal trial where the accused appears before the jury for the determination of guilt.

Victim Participation, Procedure and Evidence

The role of the victim at trial is largely constituted through the need to tender evidence. Thus, the role of the victim during the jury trial is as a witness. The modern criminal trial emerged in the latter part of the twentieth

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century with little or no role for the victim other than to appear as a witness for the prosecution. Unless required, the prosecution generally does not call the primary or direct victim at trial. Instead, the prosecution will build their case on the basis of physical or forensic evidence, or through the evidence of other secondary witnesses. As such, the law of evidence that establishes the substantive provisions that govern the admissibility of evidence fail to take account of the needs of the victim as a trial participant. The needs of particularly vulnerable groups, such as sex offences victims, and child and cognitively impaired victims, were especially neglected. By the end of the twentieth century, however, this began to change.

The rules of evidence and trial procedure in adversarial jurisdiction now contain specific provisions that seek to protect the victim, and to enable meaningful participation as a witness. These changes seek to protect the victim from unfair or prejudicial questioning, or allow for meaningful participation in a facilitated way. Increasingly, victims have a range of rights that allow for non-traditional modes of evidence, such as out-of-court evidence. The trend in international law and procedure is also increasingly influencing domestic law and policy, as is the treatment of victims in the civil law tradition. These alternatives to the adversarial criminal trial have created opportunities for law reform and policy transfer where the adversarial trial may be modified to better extend the rights of the victim. While this may increase victim participation and satisfaction within the criminal trial, reforms to better accommodate victims are justified from a range of alternative perspectives. For sex offences, the past practice of cross-examining the victim on their sexual reputation and history made the prospects of proceeding to trial particularly harrowing, and was a disincentive for reporting to the police in the first instance. The quality of the evidence from a vulnerable victim may be enhanced where they are better supported in court, or where they are able to provide evidence by statement, or give oral evidence out-of-court. Otherwise, charges may not proceed to trial where the victim may have to testify a number of times, including at a new trial following the quashing of a conviction and where a retrial is ordered.

Support of victims in order to provide testimony at trial is thus increasingly regulated and protected. These protections are contentious, in that they modify the accused's access to the victim, to cross-examine them

on their accusation, and to build a defence case based upon the blaming of the victim. However, courts are still required to provide the accused access to justice. This access resides in the provision of the fair trial, which affords the accused a due process to examine and contest the prosecution case, and to respond with their own theory of events. While the modification of criminal procedure to protect the interests of victims has significantly modified the jury trial phase, the right of the accused to test evidence still requires the victim to be examined on the content of their accusation. As such, this chapter considers the contested standing of the victim as a trial participant, and does so as their participation is increasingly constituted as a protected, participatory, or prosecuting witness (see VLRC 2015: 36–41). As rights are afforded to victims, which allow them substantive decision-making rights, victims increasingly present with enforceable rights against both prosecution and accused and this is changing how we conceptualise trial processes in the modern era.

Trial Rights: Human Rights, the Law of Evidence and the Vulnerable Victim

The right of the victim to participate in the trial varies across different courts and jurisdictions. The emergence of the ICC and the ECtHR provides some guidance as to how international law and procedure may influence the adversarial trial where international rules and standards are ratified or applied on a domestic basis. Adversarial jurisdictions are also willing to increasingly explore the ways victims are called to give evidence in civil law jurisdictions and this has allowed for creative policy transfer in certain instances. This section sets out the law and procedure regarding victim involvement in criminal trials as it applies to and seeks to modify the adversarial trial of common law countries.

The nature of victim participation more significantly departs from adversarial processes in the ICC, where, despite the court's adherence to a process that requires an adversarial exchange between prosecution and defence, victims may participate in trials. This participation extends well beyond that of witnesses and includes representational rights to

enable the victim to test the evidence of other witnesses and to make submissions to the court. The jurisprudence of the ECtHR, however, is directed at resolving the disputes that emerge from the domestic courts of member states. Various member states have an adversarial component to their criminal trial, and there is now a substantial jurisprudence from the ECtHR aimed at the rights of vulnerable witnesses and victims as participants in the adversarial trial context. The work of the European Union has also directed member states to ratify the rights of victims to procedural safeguards in the criminal justice process.

International Criminal Court

The introductory chapter of this book (Chap. 1) covers the role of the victim in the development of the law and procedure of the ICC. This section extends this framework by exploring how the ICC has integrated the victim in accordance with its processes of adversarial engagement and with regard to the principle of equality of arms between participants. Doak (2008: 137–138) suggests that the processes of the ICC significantly integrate the victim in a way that 'illustrates that it is possible to put in place a mechanism for victim participation in a forum that largely adopts adversarial procedures without infringing the rights of the accused'. Victims are not parties under the Rome Statute, although they are able to participate in proceedings. Victims may apply to participate in the Pre-trial, Trial, and Appeals chambers of the ICC. The nature of the participation will vary according to the charges, the nature of the harm, and the victim's interest in the truth of the matter before the court. While victims may participate in a number of ways that depart from an adversarial trial process, victims are able to tender evidence and call witnesses as part of a trial process.

Concern has been expressed over the victim's ability to participate at trial because it assumes that the victim has rights alongside those of the prosecution and defence where the victim's ability to call witnesses in fact flows from the ICC's power to request evidence necessary to determine the truth together with the victim's right to express their views and concerns (see Rome Statute art. 69(3)). In *Prosecutor v Lubanga*

(ICC-01/04-01/06-1432, 11 July 2008, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008), the Appeals Chamber was of the view that although the victim could lead evidence and may do so in order to establish the truth of the matter, the establishing of the guilt of the accused was the prosecution's main function at par [93–95]:

> Presumptively, it is the Prosecutor's function to lead evidence of the guilt of the accused. In addition, the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims.
>
> However, the Appeals Chamber does not consider these provisions to preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.
>
> While mindful that the Prosecutor bears the onus of proving the guilt of the accused, it is nevertheless clear that 'the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth' (article 69 (3) of the Statute). The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that 'must be convinced of the guilt of the accused beyond reasonable doubt' (article 66 (3) of the Statute).

The rights of the victim to enter evidence and to test witnesses have therefore been contested from the perspective of the need to maintain an adversarial trial as contested between the parties to the ICC—the prosecution and defence (see Wyngaert 2011). Where a victim seeks to call evidence, they need to make a written submission to the court explaining the relevance of the evidence and how it will help arrive at the truth of the matter. However, while victims can call witnesses and tender evidence, they are not required to disclose evidence to the defence prior to trial. In *Prosecutor v Katanga and Chui* (ICC-01/04-01/07 OA 11, 16 July 2010, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial'), the Appeals Chamber was of the view that the victim does not possess a particular obligation to disclose evidence to

the defence. Rather, the obligation continued to reside with the prosecution, who should investigate and seek to discover evidence that is in the possession of the victim, at par [81]:

> In this context, the Appeals Chamber recalls that under article 54 (1) (a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54 (3) (b) of the Statute, the Prosecutor may, with respect to his investigations '[r]equest the presence of and question persons being investigated, victims and witnesses'. The Appeals Chambers therefore considers that it is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence.

The ICC's role as a court that addresses and remedies mass victimisation, and gross abuse of human rights means that the court cannot be easily compared to a domestic trial court. However, despite the number of victims and the seriousness of the crimes heard by the court, the practice and procedure of the ICC is characterised as more adversarial than mixed. Johnson (2009: 491) suggests that:

> The ICC is more adversarial than inquisitorial in its structure. The ICC prosecutor presents his case to the court as an adversary; we do not have a recognizable civil law system at the ICC where an investigating magistrate collects and presents evidence in a more complete format in an attempt to find the truth. Instead, the parties litigate the inclusion and exclusion of evidence before the court.

Prosecutor v Lubanga and *Prosecutor v Katanga and Chui* provide a strong indication that victims have a foundation in ICC practice and procedure, distinguishing it from domestic adversarial courts in common law countries. Although connection may be made to domestic trial, the inclusion of the victim presents the court's jurisdiction as a hybrid of system of justice, which includes adversarial characteristics as more dominant aspects of its practice and procedure. The assemblage of processes from

different legal traditions leaves the ICC open to the criticism that it is seeking to integrate different systems of justice that ill-afford the accused the procedural protections that they would receive under a nationalised system (Johnson 2009). However, the character of the ICC is nonetheless regarded as more strongly adversarial than inquisitorial, and the victim is identified as proceeding through the existing mechanisms of the court as it accommodates an adversarial exchange between the parties: Pena and Carayon (2013: 534) note that this is evident from the outset, where the prosecution determines the relevant charge:

> One of the aspects of participation regarding which victims have expressed dissatisfaction is their inability to influence the charges brought against the accused. According to the Court's jurisprudence, a link must be established between the harm suffered by the victim and the charges brought against the accused and the incidents for which s/he will be tried. Given that the ICC prosecutor has adopted a policy of 'focused investigations and prosecutions,' this requirement poses significant challenges, in practice leaving many victims out of the scope of the cases. Although the prosecutor has pledged to ensure that investigations and prosecutions are representative of the whole scope of criminality, and the main forms of victimization practice has demonstrated that this is not always the case.

The adversarial character of the ICC is therefore established from the outset of proceedings, where the prosecution determines the relevant charge and proceeds on the basis that victims may then bring forward evidence that exposes the truth of the matter being prosecuted. The matter never becomes a victim-driven prosecution although aspects of victim participation extend upon the evidence led at trial.

European Court of Human Rights

Article 6 of the ECtHR provides the right to a fair trial.[2] This right has been interpreted in terms of criminal trials and civil hearings and may be ratified into domestic law, where a court seeks to include the interpretation of the convention as allowed by law, such as permitted under

the *Human Rights Act 1998* (UK). Enforceable victim rights have been addressed by the ECtHR in terms of fair trial rights and the right to privacy, both of which apply to modes of victim participation. The right to a fair trial is provided under art. 6, and refers to the proportionality requirements of defendant rights. Article 8 provides the right to privacy.[3] The cases considering the enforceability of the rights of the victim in the criminal trial have been brought under art. 6 and 8 of the ECHR in the context of fairness to the victim as a participant in criminal hearings. Articles 2 and 3 have also raised claims relating to victim interests, with varying degrees of success. Although art. 2 and 3 do not necessarily raise trial rights per se, where cases focus on the right to life and the prohibition on torture or degrading treatment or punishment as related to policing or pre-trial processes, they do raise issues regarding the standing of the victim that is often relevant to the trial rights of victims under art. 6 and 8. Where the victim has been incorporated under art. 6, the ECtHR has been interpreted in terms of the proportionality requirement to the defendant's right to a fair trial. Article 8 raises the victim's right to privacy, which has been interpreted in terms of providing a basis for the protection of vulnerable witnesses in the trial process.

Phrasing the Victim in the ECHR

The case of *McCann and Ors v United Kingdon* (1995) 21 EHRR 97 is authority for the positive obligation to protect all human life. It is insufficient, under art. 2 of the ECHR, to merely refrain from taking life and states must move to guard against threats made by third parties. *Osman v United Kingdom* (1998) 29 EHRR 245 provides a relevant example. Osman's widow argued that the police did not protect Osman after complaining that threats were received from a teacher. The English courts sought to follow the precedent in *Hill v Chief Constable of West Yorkshire Police* (1999) AC 53, where it was found that the police did not owe the applicant a duty to care to prevent crime. It was held that police were immune from allegations of negligence arising from their investigation. Although the ECtHR did not extend a positive obligation to the police in

this instance, it did outline a number of measures relevant to the standing of the victim at pars [115–116]:

> The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v the United Kingdom* judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.
>
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

The positive obligations placed on the state do not grant victims enforceable rights. However, *Osman* did raise the standing of victims under the ECHR and indicated that, albeit in limited circumstances, victims may possess rights enforceable against the state. This is evident in art. 3 applications where the victim has experienced torture. *Razzakov v Russia* (2015) ECHR 57519/09 determined that the victim, who was awarded compensation by civil courts for torture, but whose criminal complaint was not the subject of an effective investigation, was entitled to relief. In this case, the applicant alleged that he had been unlawfully deprived of his liberty whilst held in police custody to make him confess to a crime, and that no effective investigation into his complaints was undertaken. The court found that the victim has been subject to torture under art. 3, such that at par [64]:

> The Court finds that the significant delay in opening the criminal case and commencing a full criminal investigation into the applicant's credible assertions of serious ill-treatment at the hands of the police disclosing elements of a criminal offence, as well as the way the investigation was conducted thereafter, show that the authorities did not take all reasonable steps available to them to secure the evidence and did not make a serious attempt to find out what had happened (see, amongst other authorities, *Labita v Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV, and *Assenov and Others v Bulgaria*, 28 October 1998, §§ 103 et seq., Reports of Judgments and Decisions 1998-VIII). They thus failed in their obligation to conduct an effective investigation into the applicant's ill-treatment in police custody.

Opuz v Turkey (2009) ECHR 33401/02 places the obligation of the state to protect its citizens in the context of rights owed to the victim. In this case, HO made serious threats to the applicant and her mother. The prosecution was discontinued after the applicant withdrew the complaint, allegedly following a death threat from HO. HO killed the applicant's mother and was convicted in 2008 but immediately released due to time served. Once released, HO began threatening the applicant. The ECtHR found that Turkey's laws were inadequate and did not provide the requisite deterrent effect sufficient to ensure that the victims in the matter were protected as rights owed to them under art. 2 and 3 of the ECHR.

Trial Rights and the ECHR

The consideration of victim rights under art. 6 and 8 of the ECHR has resulted in considerable changes to normative trial processes and enforceable rights for vulnerable victims. Human rights cases under the ECHR recognise that rape victims are particularly vulnerable (see Ellison 2002: 78–79; Starmer 2014). The harm caused to the victim of crime as a result of giving personally distressing evidence has notionally been beyond the consideration of the courts out of adherence to the principles of adversarial justice that allow the accused to challenge the prosecution case. The cases before the ECtHR demonstrate the willingness to extend human rights jurisprudence to processes that involve the victim, in order to balance the rights of the victim against the requirement that the defendant receives a 'fair trial'.

In *Dooson v The Netherlands* (1996) ECHR 20524/92 the ECtHR examined the need to maintain the anonymity of a witness when they genuinely feared reprisal. The court ruled a trial will comply with convention rights where countermeasures were in place to ensure that the accused could access and examine the witness, even when this occurs in a way that does not accord with normal trial processes. States are required to organise their criminal procedure in a way that accommodates the security of witnesses when they are legitimately in fear for their safety. The interests of the defence therefore need to be balanced under art. 8 by considering effective means by which witnesses may present evidence while still allowing the defence access to the witness for the purpose of testing their evidence but to do so in a way that does not compromise the safety of the witness.

In *Baegen v The Netherlands* (1994) ECHR 16696/90, a rape victim was granted anonymity following threats of a reprisal attack. The applicant sought to cross-examine the victim, who did not want to be identified in proceedings. In this case, the ECtHR determined that art. 6 had been applied because measures were taken to afford the accused procedural fairness, in particular, by putting questions to the victim at key points throughout the trial and appeal process. The victim's right to anonymity was secured by art. 8, which is read as a positive right, such

that the court is obliged to protect vulnerable victims and witnesses on the proviso that there are alternative procedures to secure the due process rights of the accused. Where a victim gives evidence by statement, the availability of corroborative evidence will, for example, be a significant determinant in whether a degree of balance between victim and offender has been reached. The ECtHR ruled at pars [78–79]:

> The Commission observes that, during the preliminary judicial investigation, the applicant failed to avail himself of the offer of the investigating judge to put written questions to Ms. X., that in the proceedings before the Regional Court he did not request an examination of Ms. X. either before this court or the investigating judge, and that the applicant did not request the prosecution authorities to summon her as a witness for the hearing of 6 September 1988 before the Court of Appeal. It was only in the course of that last hearing that he requested the court to order an examination of Ms. X.
>
> The Commission further observes that the applicant's conviction did not rest solely on the statements of Ms. X. The Court of Appeal also used in evidence statements of police officers, the statement of Ms. X.'s mother, and the statement of K. All those statements, more or less, corroborated the version of events Ms. X. had given. They were not, however, consistent with the applicant's statements on a number of points. In the course of the proceedings before the trial courts, the applicant never requested an examination of these persons.

Bocos-Cuesta v The Netherlands (2005) ECHR 54789/00 also demonstrates the EctHR's disposition to substantive victim rights. This matter relies upon *Finkensieper v The Netherlands* (1995) ECHR 19525/92, which ruled that anonymous testimony may be tendered if adequate countermeasures sought to maintain the accused's right to access and challenge the testimony of the victim. In *Bocos-Cuesta,* the applicant alleged that he did not receive a fair trial under art. 6(1),(3)(d) of the ECHR. Here, statements provided by four youths were tendered. The accused was not given the opportunity to question the statements. The ECtHR determined at par [7.1–7.2]:

> The remaining question is whether the statements of the four children can be used in evidence although the suspect has not had the opportunity to

question them himself. The court's first consideration is the fact that Article 6 [of the Convention], particularly in the light of some recent [Strasbourg] decisions given on applications brought against the Netherlands, does not unconditionally oppose the use in evidence of statements given by witnesses whom a suspect has not been able to question. There is room for the balancing of interests. In its judgment of 26 March 1996 in the case of *Doorson v the Netherlands*, the European Court [of Human Rights] considered in this respect that the principles of a fair trial also require that, in appropriate cases, the interests of the suspect in questioning [witnesses] are to be balanced against the interests of witnesses and victims in the adequate protection of their rights guaranteed by Article 8 [of the Convention]. In the opinion of the European Court, briefly summarised, in balancing these interests much weight must be given to the question whether the handicaps under which the defence labours on account of the inability to questioning a witness in an indirect manner are compensated, and whether a conviction is based either solely or to a decisive extent on the statement of this witness. In its report of 17 May 1995 [in the case of *Finkensieper v the Netherlands*, no. 19525/92], the European Commission [of Human Rights] adopted an essentially similar opinion.

In the light of these decisions, the following can be said. As already found by the court, the interests of the four children in not being exposed to reliving a possibly traumatic experience weighs heavily. With that, as also already found by the court, stands the fact that the confrontations of these four witnesses with the suspect have been carried out with the required care, and that the results thereof, as already found earlier, are particularly reliable. As regards the acts themselves of which the suspect stands accused, the court finds it established that the four children have all been questioned by (or assisted by) investigation officers of the Amsterdam Juvenile and Vice Police Bureau with extensive experience in questioning very young persons. It has become plausible from the records drawn up by them and from the oral evidence given in court by these civil servants that the four children have been questioned in an open, careful and non-suggestive manner.

When present as a vulnerable participant, the ECtHR is therefore willing to consider alternative processes to support the needs of the victim. However, the court is mindful that any departure from normative criminal process is limited so as to maintain the rights of the accused to the state

case. In *Kostovski v The Netherlands* (1989) 12 EHRR 434, anonymous evidence was introduced as hearsay by a magistrate. The ECtHR ruled that this departure from nominal processes did not provide sufficient protection for the accused, as the defence was unable to examine the source of the information. The ECtHR ruled that evidence should be tendered in the presence of the accused because it was important that the accused be given the opportunity to examine evidence against them. Statements obtained during the investigation or pre-trial process may be tendered at trial if the defence has an opportunity to challenge the contents of the statements by putting questions to the witnesses. The ECtHR determined (at 4477–448):

> In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected.
>
> As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.

Kostovski v The Netherlands (1989) 12 EHRR 434 similarly raised the issue of the permissible limits of departing from normative trial standards. In *Van Mechelen v Netherlands* (1997) 25 EHRR 647, the applicants were convicted of following tenure of anonymous statements made by the police. The investigating judge admitted the statements on the basis that the anonymous witnesses could be questioned by defence lawyers by audio link. The ECtHR ruled that this was an unusual departure from trial processes, and that art. 6 has been breached because the defence could not observe the police as they gave anonymous evidence, nor properly test the reliability of such evidence.[4] The ECtHR is guided by the processes that establish the legitimacy of the trial taken as a whole (see Doak 2008: 74) over any substantive law that prescribes any particular departure from its form. The jurisprudence of the ECtHR thus tends toward an interpretation

of art. 6 as maintaining fair trial rights for all participants in the criminal trial process.

Starmer (2014) argues that the jurisprudence of the ECtHR founds rights for victims that may be taken as 'free standing' rights rather than rights as connected to the fair trial principles that govern the trial as a whole. This suggests a significant conceptual difference between attaching the rights of victims to protective measures as rights available to victims as stakeholders in the justice process, as opposed to protective measures being connected to the trial process generally, which principally operates to secure the due process rights of the accused.

European Union

The Council of the European Union adopted the 2001 CEU FD setting out the rights of victims in criminal proceedings as relevant to the member states of the European Union. In *Criminal Proceedings Against Pupino* (2005) EUECJ C-105/03, the European Court of Justice ruled that the 2001 CEU FD required that, at par [61]:

> … the answer to the question must be that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

Failure to adopt the 2001 CEU FD has led the Council of the European Union to adopt the 2012 CFU FD, which supersedes the 2001 CEU FD while also aimed at binding member states. Paragraph 9 of the preamble of 2012 CFU FD states that:

> Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a

> respectful, sensitive and professional manner … victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.

The minimum standards identified in the 2012 CFU FD require that member states provide victims access to information, support, protection, and procedural rights in criminal proceedings.[5] In terms of trial rights, these may include: the right to be heard during criminal proceedings and to provide evidence, the right to be protected from secondary victimisation, and the right to an individual assessment of protection needs. Groenhuijsen and Pemberton (2009) state that the directives will not lead to legal and policy change for victims because framework decisions do not come with enforcement mechanisms against member states. The ratification of the framework decision into what is described as 'hard law' arguably impedes the ability to meet the needs of victims by requiring additional administration of increasing complexity. However, such ratification ensures that the objects of the directive may be enforced within a jurisdiction, a noted problem inherent in the application of 'soft law', or policy flowing from supranational agreements.

Klip (2015) provides some commentary on the rights of the accused to a fair trial against the directives of 2012 CFU FD. With regard to the requirements of a fair trial, it is noted that '[w]hereas it may often be inevitable that the victim will be interrogated, Article 18 provides that the manner in which this is done must protect the dignity of the victim. Interviews of victims must be conducted without undue delay (Article 20, paragraph 1), the number of interviews not exceed what is really necessary (paragraph 2), victims may be accompanied by a legal representative (paragraph 3) and medical examinations must be kept to a minimum (paragraph 4)' (Klip 2015: 183). The tensions between the rights of the victim and those of the accused are realised through the practical application of the requirements of 2012 CFU FD, which provide for special protections against re-victimisation for particularly vulnerable victims, and children. The next section turns to domestic law and policy that attempts to meet these or similar standards.

Domestic Law and Practice in Common Law Jurisdictions

The accused's right to challenge the Crown case is well recognised under English domestic law. *R v Camberwell Green Youth Court* (2005) 1 All ER 999 examines s 21 of the *Youth Justice and Criminal Evidence Act* 1999 (UK), which allows for a departure from in-court evidence for young or vulnerable witnesses. However, the right of the accused to examine witnesses 'with a view to adversarial argument' is maintained. *R v Camberwell Green Youth Court* questions whether s 21 complies with art. 6 of the ECHR, because the section did not require that 'special measures' be determined on an individual case basis. The section allows young witnesses to sexual offences and violence to give evidence by live television link and video recording without the need to consider the unique circumstances of each case. Drawing from the jurisprudence of the ECtHR, Lady Hale of Richmond ruled at par [49]:

> It is difficult to see anything in the provisions of the 1999 Act with which we are concerned which is inconsistent with these principles. All the evidence is produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused can see and hear it all. The accused has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is a face to face confrontation, but the appellants accept that the Convention does not guarantee a right to face to face confrontation. This case is completely different from the case of anonymous witnesses. Even then the Strasbourg Court has accepted that exceptions may be made, provided that sufficient steps are taken to counter-balance the handicaps under which the defence laboured and a conviction is not based solely or decisively on anonymous statements (see *Doorson v Netherlands* (1996) 22 EHRR 330, 350, para 72; *Van Mechelen v Netherlands* (1997) 25 EHRR 647, 673, paras 54, 55; *Visser v Netherlands*, Application No 26668/95, Judgment 14 February 2002, para 43).

In England and Wales, modification of normative criminal trial processes by affording victims and witnesses access to protected or special

measures is not invalidated by the requirement that the court provides the accused a due trial process. In *R v Camberwell Green Youth Court*, Lord Roger of Earlsferry indicated that the ECtHR did not limit their reading of art. 6 as requiring the accused to be present in the same room as the testifying witness, if the accused is granted an adequate opportunity to examine and challenge the witness. Similarly, s 23 of the *Criminal Justice Act 1988* (UK) (repealed) allowed for the tenure of hearsay evidence if the witness is a 'frightened witness'. *R v Sellick and Sellick* (2005) 2 Cr App R 15 holds that where the witness is in fear of the accused, the witness' statement could be tendered without the capacity to call the witness for cross-examination in court. This could be the case where a statement became significantly determinative against the accused. Lord Justice Waller, with whom Mr Justice Owen and Mr Justice Fulford agreed, held, dismissing the appeal at par [57]:

> Our view is that certainly care must be taken to see that sections 23 and 26, and indeed the new provisions in the Criminal Justice Act 2003, are not abused. Where intimidation of witnesses is alleged the court must examine with care the circumstances. Are the witnesses truly being kept away by fear? Has that fear been generated by the defendant, or by persons acting with the defendant's authority? Have reasonable steps been taken to trace the witnesses and bring them into court? Can anything be done to enable the witnesses to be brought to court to give evidence and be there protected? It is obvious that the more "decisive" the evidence in the statements, the greater the care will be needed to be sure why it is that a witness cannot come and give evidence. The court should be astute to examine the quality and reliability of the evidence in the statement and astute and sure that the defendant has every opportunity to apply the provisions of Schedule 2. It will, as section 26 states, be looking at the interests of justice, which includes justice to the defendant and justice to the victims. The judge will give warnings to the jury stressing the disadvantage that the defendant is in, not being able to examine a witness.

However, in *R v Martin* (2003) 2 Cr App R 21, the Court of Appeal of England and Wales did not allow a similar statement where the witness was intimidated because the court had concerns that it was unreliable evidence. The court also found that as the accused was unfit to stand trial, he

could not testify in his defence. Lord Justice Potter, Mr Justice Mackay, and His Honour Judge Mellor, held at par [61]:

> …we find ourselves unable to support the judge's exercise of his discretion to admit the statement of Tamba Bona. It is not in dispute that the entire case for the prosecution rested upon Tamba Bona's statement. Thus, while it was plainly in the interests of justice so far as the prosecution was concerned that the statements should be before the jury, it was also in the interests of justice from the point of view of the defendant that he should not be unduly disadvantaged by admission of the statements in circumstances where they could not be made the subject of cross-examination.

The 'special measures' available to vulnerable and intimidated witnesses include the use of screens, live TV link, giving evidence in private (though this is restricted to sexual offences and those involving intimidation), having counsel remove wigs and gowns, and the use of video recorded interviews as evidence-in-chief.[6]

In 2003, the *Criminal Justice Act 2003* (UK) was amended to enable admission of hearsay evidence where it releases an intimidated witness from cross-examination. Section 116(1) provides that a statement, not given in oral evidence in the proceedings, is admissible as evidence of any matter stated if (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter, (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and (c) any of the five conditions mentioned in subsection (2) is satisfied. Subsection 2(e) provides the condition:

> that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

The introduction of s 116 of the 2003 Act broadened the circumstances in which statements of intimidated witnesses would be admissible. Unlike s 23 of the 1988 Act, s 116 applies to oral and written evidence. Statements do not need to be made to a police officer. The term

'fear' is also read broadly, to encompass a range of potential reasons for not wishing to testify, including the suggestion that the witness is intimidated by the court in which they are called to give evidence. As Lord Justice Waller said in *Sellick* at par [53]:

> In our view, having regard to the rights of victims, their families, the safety of the public in general, it still cannot be right for there to be some absolute rule that, where compelling evidence is the sole or decisive evidence, an admission in evidence of a statement must then automatically lead to a defendant's Article 6 rights being infringed. That would lead to a situation in which the more successful the intimidation of the witnesses, the stronger the argument becomes that the statements cannot be read. If the decisive witnesses can be "got at" the case must collapse. The more subtle and less easily established intimidation provides defendants with the opportunity of excluding the most material evidence against them. Such an absolute rule cannot have been intended by the European Court in Strasbourg.

The Court of Appeal (Criminal Division) has recently affirmed its adherence to special measures to assist vulnerable victims. Indeed, the Lord Chief Justice of England and Wales has recently affirmed the limits that may be reasonably placed on questioning of both child and adult victims deemed vulnerable in proceedings. In *Criminal Practice Directions Amendment No. 2* (2014) EWCA Crim 1569, Lord Thomas of Cwmgiedd CJ amended the *Criminal Practice Directions 2014*, which sets out the criminal procedure of vulnerable witnesses at 3E.4:

> All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on

> questioning are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance. Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial.

Access to special measures for child victims, or the extent to which questioning may depart from adversarial exchange for vulnerable adults, supports the substantive participation of the victim. Henderson (2014: 95) has argued that three areas of reform may be identified to better accommodate child and vulnerable victims. This includes limiting the chances of miscommunication by developing questions consistent with the developmental needs of the witness; by limiting suggestive questions, and by limiting cross-examination to test and challenge the witness (see Hoyano 2015; Starmer 2014; the law of Scotland has also been recently modified to better accommodate child and vulnerable witnesses, see Raitt 2013). The extent to which child and vulnerable witnesses should be accommodated by adoption of a modified process by way of separate hearings to set ground rules for the examination of witnesses as apart from the trial was further considered by Lady Justice Hallett DBE, in *R v Lubemba* (2014) EWCA Crim 2064, where it was said that such special hearings ought to be standard, at par [42]:

> The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every

> case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.

However, throughout the course of the latter part of the twentieth century, trial processes have been increasingly modified across common law jurisdictions that are not signatories to any particular human rights framework. In these jurisdictions, the law of evidence has been increasingly shaped by human rights as a process of law reform. The modification of defendant rights in favour of victim interests can be demonstrated most strikingly in the case of rape law reform in New South Wales and the other states and territories of Australia. Most common law jurisdictions now specifically cater for the vulnerable victim of rape out of the need to recognise the sensitive nature of rape prosecutions. Rape victims are a particularly vulnerable class of victim, not only because rape is such a private offence, but because consent to intercourse in rape trials is largely determined on the basis of conflicting perspectives between victim and defendant. It is out of the realisation that rape victims are especially vulnerable in the adversarial context of the trial that most governments have now moved to protect rape victims by directly modifying standard trial process. As indicated above, numerous common law jurisdictions now cater for the needs of sex offences victims in the trial process out of recognition of the significant impact of the trial upon them, leading to their potential re-victimisation on the witness stand.

The legislation that prescribes rights for sex offences victims targets various risks faced by the victim during the trial process. The victim's right to a modified trial process is best categorised as rules that modify the existing trial process, usually by prescribing limits and prohibitions as to what may be asked of a victim as they testify in court, and alternatives to testifying in court, by providing evidence out-of-court or in another way. Some examples are referred to below to demonstrate the significant ways in which the conventional trial process is modified to either protect the victim, allow for a mode of safer participation, or to grant the victim rights that may be enforced against the state and accused, should their right to participate in the prescribed way be denied or not realised in proceedings.

In NSW, for instance, rape victims have been increasingly protected as vulnerable witnesses since the 1981 reforms abrogating the common law offence of rape for sexual assault (see above discussion, ss 293-294C *Criminal Procedure Act 1986* (NSW)). Out of the need to recognise the autonomy of the person, the gendered and sexualised nature of rape at common law, the underreporting of rape as a serious offence, and the re-victimisation most witnesses experience through exposure to police and court processes, various rights and privileges available to the defendant at common law have been wound back or limited. These rights have been variously described as rights that pertain to a victim's need for protection, or to enable their safe participation, or in certain instances, to provide rights enforceable against the state and/or accused, where rights of protected participation are not afforded to victim in the prosecution process (see VLRC 2015: 36–41). The defendant's right to cross-examine the victim on their sexual history as evidence potentially relevant to the victim's tendency to consent to intercourse has been significantly limited out of need to respect the integrity of the victim and to refocus the trial away from the character of the victim, and on the incident in question, which may now be characterised as sexualised violence. In the NSW context, reform of the law of rape has continued into the twenty-first century, as it has in other states and territories.[7]

The most recent reforms allow courts to make exceptions for sensitive evidence for protected persons (e.g., indecent images used in trials);[8] the victim may give their evidence in chief in the form of a recording where the complainant is a victim of domestic violence;[9] the victim is entitled to give evidence in camera where they are the victim of a prescribed sexual offence;[10] evidence relating to sexual experience is generally inadmissible;[11] where there is a lack of complaint or a delay in making a complaint for a prescribed sex offence a warning must be given to the jury that the lack of complaint does not necessarily indicate that the complaint was false;[12] that a judge must not issue a warning to the jury that the victim's evidence is unreliable because they form part of a class of witness deemed unreliable;[13] that the accused is not to put questions to the victim personally for prescribed sex offences;[14] that the victim (of a prescribed sex offence, a victim applying for an apprehended violence order, or a victim of a domestic violence offence) is able to give evidence

by alternative arrangements, including allowing the victim to provide testimony behind a screen or via closed-circuit television, or planned seating arrangements so as not to place interested persons within the line of sight of the victim giving evidence;[15] that the victim may have a support person present when giving evidence;[16] and that the prosecutor, on a new trial against an accused person, tender as evidence a transcript of the original proceedings against the accused.[17] The tendering of the original trial transcript essentially removes the victim from the re-trial altogether, saving the victim from having to testify all over again, but denying the defendant the ability to face their accuser and cross-examine them, via counsel, on their original testimony (see Friedman and Jones 2005; Powell et al. 2007; as to hearings for non-criminal sexual harassment, see *Ewin v Vergara (No. 3)* (2013) FCA 1311).

The examination of vulnerable victims in court has developed in response to policy and statutory reform where not directly informed through human rights instruments. Vulnerable victims generally follow the international framework of special measures for children or cognitively impaired persons.[18] In NSW, vulnerable victims are able to give their evidence out-of-court in the form of previous recordings of evidence.[19] This may include a recording of a statement made by an investigating official. Such victims may also give evidence by closed-circuit television link.[20] Where such facilities are not available, the court should provide alternative arrangements, including the use of screens, planned seating arrangements or the use of alternative premises.[21] Vulnerable victims may also request a support person, who may also assist the court with interpretation where there are difficulties giving evidence.[22] Vulnerable witnesses possess rights similar to those available to sex offences victims regarding the right not to be examined by the accused directly, who must pose questions through another person.[23] A vulnerable victim may, however, be required to undergo cross-examination on the content of the recording previously made.[24] While this may occur orally in the courtroom, cross-examination may also occur through one of the identified alternative arrangements, specifically by closed-circuit television, available for sex offences and other victims as indicated above. However, the court may order that evidence may not be given by alternative arrangement where the court is satisfied that it is not in the interests of justice to do so.[25]

Roberts v The Queen (2012) VSCA 313 reflects on the amendment of the law of evidence in Victoria, particularly in terms of the insertion of Pt 8.2 of the *Criminal Procedure Act 2009* (Vic) regarding special provisions for the protection of witnesses in criminal trials. In this matter, Tate JA remarks that:

> Part 8.2 was introduced by s 50 of the *Criminal Procedure (Consequential and Transitional Provisions) Act 2009*. It is largely based upon comparable provisions in the Evidence Act 1958 which had been introduced or strengthened as a result of recommendations made by the Victorian Law Reform Commission in its report, Sexual Offences: Final Report, following its review of the law of sexual offences. In particular, s 349 is modelled upon s 37A of the Evidence Act.
>
> The Commission's inquiry was intended in particular to address the substantial under-reporting of sexual offences. It concluded that what was contributing to this problem was a 'widely held perception that the criminal justice system does not always deal fairly with complainants in sexual offence cases'. It reported that 'concerns about the fairness of the criminal justice system … may discourage people from giving evidence against alleged offenders at committal and trial'. While acknowledging that 'cross-examination of witnesses is an essential feature of an adversarial criminal justice system', the Commission also recognised that 'the focus on the complainant's behaviour and credibility during cross examination can also cause significant distress'. The Commission identified several features of trials for sexual offences that made them particularly distressing for complainants, and these included the 'traumatic effect of unnecessarily intimidating or confusing cross examination'.

The extent to which the *Charter of Human Rights and Responsibilities Act 2006* (Vic) modifies or extends the provision of victim rights in Victoria remains unclear. In *Slaveski v State of Victoria & Ors* (2009) VSCA 6, the Court of Appeal of the Supreme Court of Victoria was asked to consider the applicant's human rights pursuant to ss 9, 10, 17 of the 2006 Act. The sections provided basic rights to life, to be free from torture, cruel, inhuman or degrading treatment, and state protection for families and children, respectively. The court declined to consider this ground of appeal on the basis that the issue was not raised at first instance, but the case does

raise the prospect that the Victorian Human Rights Act may apply to victims of crime. In so doing, it may extend the rights available to victims in accordance with known principles of human rights.

In addition to protections under the law of evidence and the provision of modes of out-of-court evidence, intermediaries may also be used to assist special and vulnerable victims. Intermediaries assist vulnerable witnesses by putting questions in a way that allows the victim or witness to comprehend the question. An intermediary may also assist the court by phrasing the answer for the witness. Intermediaries are not meant to argue a case for the victim, rather they assist the court by helping the victim give evidence in as clear a way as possible (see Bowden et al. 2014). Intermediaries may include trained psychologists, nurses, social workers, and teachers. Intermediaries may assist both prosecution and accused, and may meet with both parties to determine ways of putting questions to the victim or witness that allows for best comprehension.

Intermediaries are available in England and Wales pursuant to the *Youth Justice and Criminal Evidence Act 1999* (UK) s 16(1),(2). Intermediaries are available for witnesses and victims who are under 18 at the time the matter reaches court, have a learning difficulty or mental disorder, have impaired intellectual or social functioning, or have a physical disability or disorder. In NSW, witnesses with a communication difficulty are able to seek assistance from a person or communication aid, which includes, any electronic device that assists with communication. The NSW procedure is limited to persons who ordinarily assist the victim or witness on a daily basis. Therefore, professionals are permitted in England and Wales, but are precluded under NSW provisions.[26] In *R v Anthony Roy Christian* (2015) EWCA Crim 1582, the Court of Appeal (Criminal Division) gave useful guidance as to the conduct of intermediaries during the trial, with specific regard to support for a rape victim in the context of heated cross-examination.

Domestic Law and Practice in Civil Law Jurisdictions

Civil law jurisdictions permit victim participation in the criminal trial through rights that allow for representation through subsidiary or accessory prosecution, partie civile, or adhesive prosecution. Rights to compensation

through participation as partie civile or adhesive prosecution are discussed in Chap. 7. The rights of victims vary in the criminal trial of civil law jurisdictions depending on whether the individual jurisdiction has an adversarial trial phase. While most civil law countries have an inquisitorial pre-trial process, involving an investigative magistrate or judge making enquiries into the matter, by calling and testing evidence and determining if the matter ought to continue to trial, the trial phase can be adversarial or of an adversarial character, where systems of inquisitorial and adversarial justice converge into the one trial process defined by the rules of procedure and evidence (see Schwikkard 2008; Summers 2007; Safferling 2011).

This section examines those jurisdictions that have an adversarial or partly adversarial trial phase. Those European jurisdictions with an adversarial trial phase include Italy, The Netherlands, Denmark, Portugal, Spain, and Sweden. France and Germany have a wholly inquisitorial criminal procedure. This section focuses on the criminal procedure of Italy to demonstrate the conscious movement of a legal system to a party-driven, hybrid adversarial system that can be compared to the shaping of the criminal trial with regard to the integration of victim rights in common law countries. Italy adopted their present *Codice di Procedura Penale* or Code for Criminal Procedure in 1988 after it became apparent that the existing system lost sufficient distinction between the pre-trial investigative phase and the trial. The role of examining magistrate and prosecution became blurred, and the trial referred back to the evidence collected during the pre-trial phase, such that the distinction between the two phases diminished, and sentences were handed down on the basis of evidence that was presented by the merged roles of magistrate and prosecutor. As such, the trial court did not seek to test evidence and rarely relied on new evidence, but proceeded on the basis of a case file comprised of prosecution evidence (see Di Amato 2011; Brienen and Hoegen 2001: 507).

The Code for Criminal Procedure was designed to transform the Italian justice system with a view to installing an adversarial process that contained an investigative pre-trial phase, which can be likened to a committal hearing in the common law system in that it leads to a confirmation of an indictment, with a party-driven adversarial trial. The Code for Criminal Procedure of 1988 provided for a major shift away from an inquisitorial

process for an accusatory one. The decision to move toward an accusatory model was made on the basis of the poor functioning of public authorities, a slow justice system that could not deliver access to justice under an increasing caseload, and the need to separate the phases of the trial in a way that allowed for the proper investigation and testing of the case. The prosecutor's role was no longer merged with that of a judge, and the evidence gathered during the pre-trial phase no longer has a determinative effect on the trial.

The court structure in Italy contains several trial courts. These include the *Pretore* or Subdistrict Court, otherwise known as the Justice of the Peace Court, where petty offences are heard, and whose judgements are appellable to the *Tribunale*; the *Tribunale*, or District Court, where most major offences are heard and whose decisions may be challenged on fact or law in the *Cotre d'Appello* or Court of Appeal; and the *Corte d'Assises*, or Court of Assizes, which hears major crimes, such as murder and terrorist offences, where cases may be further appealed to the *Corte d'Assise d'Appello*, or Appeal Court in Azzise Cases. Matters may be further appealed to the Italian Supreme Court of Cassation, the *Corte Suprema di Cassazione*, on the basis of law or process alone (Di Amato 2011: 28). Courts are able to return verdicts other than guilty or not guilty. Where an accused is found not guilty, the verdict may be qualified to render the character of the accused innocent. Thus, an accused may be not guilty by reason that the alleged offence never occurred, or that the offence did occur but that the accused is not liable, or that the alleged crime is not an offence because a full defence excusing the accused was successfully applied. A court may also acquit the accused because it determines that requisite procedure was not followed or *non doversi procedure*, such as where the prosecution lacks the consent of the victim to initiate a prosecution in the first instance (see Di Amato 2011: 189–190; Brienen and Hoegen 2001: 513).

There is no jury system in Italy, the Constitution instead requiring that a verdict must contain reasons, excluding the possibility of a jury trial as known in the common law system (Brienen and Hoegen 2001: 513). The *Pretore* is always comprised of a single magistrate or judge. The *Tribunale* is comprised of a single judge or a panel of professional judges, usually three. The *Corte d'Assises*, hearing the most serious matters, consists of two pro-

fessional judges and six lay judges. The two professional judges consist of a President, a judicial member from the appellate level, and a panel judge qualified from an ordinary court. The lay judges are jurors, selected from the community and having met several qualifying criteria.[27]

The investigative phase is now conducted by the judicial police with the assistance of the prosecutor. The victim makes the complaint to the police and the investigation continues based on the evidence of the complaint. Other evidence may also be collected during this stage. Victims or a proxy may report an offence, orally or in writing. Citizens may face a fine where a reportable offence is not reported. Certain public officials, such as hospital staff or heal workers have a particular duty to report. Victims will report to the state police or they may contact the prosecutor directly. If the victim has counsel or a representative the prosecution will file the report and will keep the victim or their counsel informed as to the progress of the investigation. Certain crimes require the filing of a complaint in order to be prosecuted according to law. Should no complaint be filed, an accused may be entitled to an acquittal. Victims may file charges or present a statement to police. A statement does not have the effect of initiating an investigation, and may be used where the offender acts again.

The pre-trial phase enables the *Giudice per le Indagini Perliminari*, or Judge of the Preliminary Investigation, to oversee the investigative activities of the prosecutor and to guarantee the rights of the accused during the investigation. The preliminary stage judge does not investigate the office but protects defendant rights by authorising coercive measures, allotting phone intercepts, or by validating the arrest of suspects and their detention (Brienen and Hoegen 2001: 512). All evidence collected during the pre-trial phase is not automatically tendered at trial, unless it is of probative value and where it cannot be specifically collected again for trial. In effect, all evidence is expelled from the case file other than those items that cannot be collected afresh, such as autopsy results, or the initial search of the suspect of their property. The preliminary stage judge also grants motions that allow such evidence to be presented at trial. When the prosecution has presented its case, the preliminary stage judge will make a determination, and if sufficient evidence is presented that allows for a guilty verdict, an indictment is issued and the matter proceeds to trial (Di Amato 2011: 165–168).

The preliminary hearing may result in the accused seeking to have their matter referred to a special proceeding, to avoid trial and to proceed directly to plea-bargaining or sentencing. After negotiating this option with the prosecution, should the accused proceed in this way, they will be sentenced by the preliminary stage judge who must first be satisfied as to the offender's guilt. The preliminary stage judge may find the accused guilty following an examination of the evidence. It is the accused who must seek this option from the judge, requesting to forgo any further proceeding. The accused will be entitled to a sentencing discount of one-third of the usual penalty where this is recommended by the prosecution (Brienen and Hoegen 2001: 514). The sentencing discount will normally be the subject of the negotiation prior to this option being chosen. The accused may also seek a plea-bargain. This is available where the original offence carries a sentence of no more than 2 years imprisonment. The preliminary stage judge will examine the evidence to ensure that the accused is not otherwise entitled to an acquittal (Di Amato 2011: 168–190).

The Code for Criminal Procedure granted several new powers to victims in addition to those powers existing prior to its introduction. The victim possesses several important pre-trial and trial rights under the Code for Criminal Procedure, art. 90–95; 101; 336–369; 398–421; 451–456; 505; 527. The victim has the right to file notes and indicate a source of evidence; to appoint counsel; to file a complaint; to ask the prosecutor to act on the complaint as filed; to participate in the appointment of experts alongside the prosecutor; to see documents deposed by the judicial police or the prosecution; to present documents and requests to the prosecutor; to receive a copy of the indictment; to request that the prosecutor hold a pre-trial hearing to take evidence; to participate in these pre-trial evidence hearings; to obtain a copy of the record of an evidence hearing; to be notified of and participate in the hearing regarding an extension of time of the pre-trial stage; to be notified of the prosecutor's request to dismiss the matter; to oppose the dismissal of the matter, and to be notified in sufficient time to prepare a response; to make a submission as to why the case ought to continue and to carry out further investigations; to participate in hearings in chambers as requested by the judge to refuse to dismiss the matter; to ask the chief public prosecutor to bring charges if the public prosecutor will not; to be notified of the date of the preliminary hearing;

to present witnesses to the court without summons; to be notified where the accused seeks to try the case during the immediate trial proceedings (preliminary proceedings); to submit that the judge asks specific questions of the witnesses, experts, other parties to proceedings and to submit evidence during trial (victim organisations have similar rights); and to request that the prosecution contest certain legal actions (Brienen and Hoegen 2001: 519–520).

The requirements of a fair trial in the context of an adversarial exchange between the parties is provided for under the Italian Constitution. Article 111 of the Constitution of the Italian Republic states that:

> Jurisdiction is implemented through due process regulated by law.
>
> All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials.
>
> In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted.
>
> In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel.
>
> The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct.
>
> All judicial decisions shall include a statement of reasons.

The *dibattimento* or trial phase consists of the examination of the victim and the witnesses to the incident. Certain offences require that the victim testifies personally. Expert witnesses may also be called. The

defence has the right to cross-examination following the presentation of the prosecution case. All evidence gathered during the preliminary phase must be re-gathered for the trial, with the exception of that evidence permitted to be tendered. Any scientific or expert finding involving a test of evidence must be re-tested for trial. This allows the accused full access to the testing of the case and prevents the trial judge forming any view based on pre-existing evidence in the case file.

As with other civil law jurisdictions, victims in Italy enjoy rights of participation and standing in the criminal process as the injured party, or *parte lesa*. Articles 90–95 of the Code for Criminal Procedure governs victim participation, which spans personal representation or representation by an organisation. The victim may become party to proceedings by requesting appearance at trial. Where this is granted, the victim or their counsel may examine and cross-examine witnesses, make submissions on the evidence, and present alongside the prosecutor. The victim may also present as adhesive prosecutor, although this may be done separately from trial.

When the judge is satisfied that the evidence establishes the guilt of the accused beyond reasonable doubt they will convict the accused. Reasons justifying the verdict must be published by the court. Italy advocates a system of punishments based on the rehabilitation of the offender and where an accused is convicted but has no prior record, the court will likely consider a suspended sentence with immediate probation for non-violent offenders.

The adversarial character of the criminal trial of Italy is evident through a trial process that is shaped around qualities that are consistent with the adversarial tradition—a party lead system where the judge is independent (despite forming a bench of professional or lay judges); for serious offences at least, jurors, or if no jury, lay judges who although not analogous to the jury in the adversarial common law tradition, seek to represent the people; and counsel who lead evidence and cross-examine opposing witnesses. It may be that the cross-examination process is not performed as aggressively as occurs in common law jurisdictions, given that counsel are still versed in the past practice of narrative evidence. Thus, although considered adversarial, Italian criminal process continues to be informed by aspects of past culture that inform modern adversarial practices.

Brienen and Hoegen (2001) suggest that victim rights in Italy are lacking, and this is probably true when Italian criminal procedure is compared to alternative European countries that afford victims substantial rights as a part of an inquisitorial system.[28] Limitation periods placed upon the prosecution restrict investigation periods to between 6 and 12 months, and the process for initiating a complaint may be complex when compared to other jurisdictions where any person can act as informant. The process of complaint-making and the difference between filing charges or making a statement mean that some victims, especially those of domestic or partner violence, make statements that are never actioned (Brienen and Hoegen 2001: 523). Brienen and Hoegen (2001: 524) also indicate that the Code for Criminal Procedure was designed to permit separate civil claims and in the Italian tradition of state-controlled prosecutions, this mode of victim participation is preferred. Thus, although victims can exercise powers of participation, including those available during the preliminary investigation as potentially relevant to the trial phase, victims are not encouraged to do so, and many are not informed of their rights in this regard. However, the Code for Criminal Procedure when reformed in 1988 expanded the range of powers exercisable by the victim and these may now substantially inform the preliminary and main trial.

Summary Disposal and Alternatives to Trial

Trial by jury is the mode of disposal where a matter proceeds on indictment. Most matters are dealt with in courts of summary jurisdiction before a magistrate sitting alone. While this chapter focuses on rights relevant to trial by jury, or its equivalent in civil law, this section addresses some of the issues that present where a victim is required to participate in a contested hearing in the Local Courts or Magistrates' Court. While the law of evidence and criminal procedure is relevant to summary hearings, the types of charges heard before a Magistrate tend to preclude or limit participation of the victim. This includes public order offending, drug possession and minor supply, and road transport offences. However, a range of alternatives to trial, including determinations for domestic violence offences and Apprehended Violence Orders (AVOs), a form of intervention order

imposed on the offender requiring that certain conditions be complied with, are made in the Local Court. Thus, for a large number of victims, the summary processes of the Local or Magistrates' Court provides the hearing or 'trial' that constitutes their engagement with the criminal trial process.

As traced above, the law of evidence has been modified to accommodate the needs of domestic violence victims or AVO applicants when presenting for hearing in the Local Court. The *Criminal Procedure Act 1986* (NSW) s 289F now provides that victims may present their evidence in chief in the form of a recording:

> s 289F Complainant may give evidence in chief in form of recording
>
> (1) In proceedings for a domestic violence offence, a complainant may give evidence in chief of a representation made by the complainant wholly or partly in the form of a recorded statement that is viewed or heard by the court.
>
> (2) A representation contained in a recorded statement may be in the form of questions and answers.
>
> (3) A recorded statement must contain the following statements by the complainant:
>
> (a) a statement as to the complainant's age,
> (b) a statement as to the truth of the representation,
> (c) any other matter required by the rules.

The provisions now allow for a victim to make a representation in their evidence that establishes the 'truth' of the allegation. This is a substantial departure from evidence that normally constitutes the adversarial process, where the right to call evidence and examine witnesses in order to locate the truth of the matter is not compatible with the requirement that the prosecution establish the elements of the offence and/or defence per *Woolmington v DPP* (1935) AC 462.

Where a victim of domestic violence does give evidence in court they may rely on protections that were formerly only available to victims in sex offences cases, pursuant to the *Criminal Procedure Act 1986* (NSW) s 294B:

> s 294B Giving of evidence by complainant in prescribed sexual offence proceedings-alternative arrangements

(2A) This section applies in addition to Part 4B, if the complainant is a domestic v0iolence complainant.

(3) A complainant who gives evidence to which this section applies is entitled (but may choose not):

(a) to give that evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom, or

(b) to give that evidence by use of alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused person or any other person or persons in the courtroom, including the following:

(i) use of screens,

(ii) planned seating arrangements for people who have an interest in the proceedings (including the level at which they are seated and the people in the complainant's line of vision).

Victims of certain offences who were routinely dealt with in the Local Court are now provided similar protection as found in the higher trial courts out of recognition of the status as especially vulnerable during the hearing process. Victims applying for an AVO are also able to present evidence under the protections of s 294B as long as the accused has been charged with a proscribed sex offence.

The Protected, Participating or Prosecuting Witness

The victim's role in the jury trial phase is largely that of witness. However, the development of the rights of victims can be interrogated based on the content of those rights that afford the victim a degree of protection and participation as a witness in the criminal trial. The development of processes to protect and enhance the victim's ability to give evidence is also supported by the emergence of new powers that grant the victim a degree of substantive control over proceedings, albeit such powers tend to be exercised by the prosecution in order to give full effect to the testimony of

the victim at trial. Given this context, it is therefore possible to talk of the emergence of the victim as a participating and even prosecuting witness, particularly with regard to the rights of the victim as they emerge in international law and practice, or under the civil law tradition of the subsidiary prosecutor or partie civile, and as applied to law reform and policy developments across common law, adversarial jurisdictions. The VLRC (2015) utilises a typology of protected, participating, or prosecuting witness in order to emphasise the different way in which victim rights may work to modify criminal procedure in the adversarial context.

Human rights otherwise foreign to the common law, including those now relevant to victims, defendants, witnesses, and others involved in the criminal process promulgated under the ECHR, or where available by statutory framework, now inform the very processes by which we determine the guilt of the accused. It is not that the common law is not concerned with certain human rights prescribed under the ECHR. To a significant extent, the right to a fair trial under art. 6 of the ECHR mirrors the requirements of a right to a fair trial at common law: *Barton v The Queen* (1980) 147 CLR 75; *Maxwell v The Queen* (1996) 184 CLR 501. The ECHR has, however, informed new directions in trial procedure beyond that previously affirmed at common law. Victim interests other than those traditionally secured by an adversarial criminal trial are increasingly cited as impetus for modifying standard trial processes. This grants victims the capacity to ask for alternative measures and allows victims to access those measures, as a substantive right afforded by law.

The modification of the accused's right to a fair trial at common law by the introduction of special measures to protect the integrity of the victim from, for example, giving evidence of a distressing or embarrassing nature, indicates how human rights discourse may effectively elevate the standing of the victim as a trial participant. Victims are now possessed of enforceable rights of substantive consequence for criminal trial evidential determinations. These rights rarely require enforcement, because they are usually the subject of a pre-trial motions hearing where the prosecution requests special measures to accommodate the testimony of the victim during the trial. Thus, the victim's right to be protected during the trial phase will be exercised on motion of the prosecution, which holds a clear interest in securing the testimony of the victim. The rights of the victim

to special measures under criminal procedure are therefore rights that secure both victim and state interests in protecting the vulnerable victim from the potentially traumatising consequences of giving evidence and being cross-examined in open court. Although these rights are of a substantive character, and can be enforced against the accused who may seek to maintain their right to examine the victim before the jury, the court will act to secure the interests of the victim at the prosecution's request, where the victim meets eligibility criteria and where there is legitimate concern for the victim's welfare in court. This is particularly so where the victim is unlikely to testify unless protective measures are in place, and where the prosecution case rests on the victim's testimony as to, for instance, a lack of consent.

The adversarial criminal trial is transforming to accommodate the needs of the victim and this is occurring internationally. Although jurisdictions reform criminal procedure in accordance with their national and legal context, which includes the legal traditions to which they ascribe, the impact of international norms and the convergence of adversarial and inquisitorial systems (see Summers 2007) establish possibilities of convergence that promote a degree of legal and policy transfer (see Schwikkard 2008). The enactment of a new criminal procedure in Italy in 1988 demonstrates this potential, but reforms may also be identified in the particular detail of discrete amendments to established criminal procedure that provide new opportunities for victim participation without changing the character of the justice system to non-adversarial.

Notes

1. The victim may engage with the jury in sentencing hearings in the USA, where the victim may present a VIS to the jury in a sentencing matter. Not all US states retain the jury in the sentencing phase, and this process is not covered in the book.
2. Art. 6 of the ECHR provides: (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic

society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. (3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

3. Art. 8 of the ECHR provides: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. Also see *Doorson v The Netherlands* (1996) 22 EHRR 330.
5. The position in England and Wales regarding the implementation of 2012 CFU FD and the requirement that member states adopt the framework directive in national or domestic law is now modified by *Assange v The Swedish Prosecution Authority* (2012) UKSC 22. The Supreme Court of the United Kingdom ruled that, while the ruling will not affect the outcome of *Pupino*, the UK parliament may continue to legislate as though *Pupino* has been applied, and was thus not bound to adopt the framework directive. Lord Phillips at par [10] states: 'I have read with admiration Lord Mance's analysis of the effect of the decision in *Pupino* and I accept, for the reasons that he gives, that it does not bind this Court to interpret Part 1 of the 2003 Act, insofar as this is possible, in a manner that accords with the Framework Decision. I consider, nonetheless that it is plain that the Court should do so. This is not merely because of the presumption that our domestic law will accord with our international obligations.' *Assange* thus modified the general position regarding the ratification of laws that correspond to EU framework directives, pursuant to

Dabas v High Court of Justice in Madrid, Spain (2007) 2 AC 31. Lord Bingham stated at par [5] that: 'By article 34(2)(b) of the Treaty on European Union, reflecting the law on directives in article 249 of the EC Treaty, framework decisions are binding on member states as to the result to be achieved but leave to national authorities the choice of form and methods. In its choice of form and methods a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member states under article 10 of the EC Treaty.' Thus while a national court may not interpret a national law *contra legem*, it must 'do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU' (*Criminal Proceedings Against Pupino* (Case C – 105/03) [2006] QB 83, [2005] EUECJ C-105/03, paras 43, 47).'

6. See *Youth Justice and Criminal Evidence Act* 1999 (UK) ss 23–30. Also see Ministry of Justice (2011) *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*, Ministry of Justice, UK.
7. See generally ss 339–365 *Criminal Procedure Act 2009* (Vic); ss 290-306ZP *Criminal Procedure Act 1986* (NSW); ss 36B-36BC *Evidence Act 1906* (WA). As to current provisions prohibiting the accused from cross-examining a vulnerable witness, see ss 356 and 357 *Criminal Procedure Act 2009* (Vic), s 294A *Criminal Procedure Act 1986* (NSW), and s 106G *Evidence Act 1906* (WA).
8. *Criminal Procedure Act 1986* (NSW) s 281B 'Sensitive evidence-meaning (1) For the purposes of this Part, anything that contains or displays an image of a person (the 'protected person') is 'sensitive evidence' if: (a) the image is obscene or indecent, or (b) providing a copy of the image to another person without the protected person's consent would interfere with the protected person's privacy, or (c) the image was taken after the death of the protected person.'
9. *Criminal Procedure Act 1986* (NSW) s 298F 'Complainant may give evidence in chief in form of recording (1) In proceedings for a domestic violence offence, a complainant may give evidence in chief of a representation made by the complainant wholly or partly in the form of a recorded statement that is viewed or heard by the court. (2) A representation contained in a recorded statement may be in the form of questions and answers. (3) A recorded statement must contain the following statements by the complainant: (a) a statement as to the complainant's age, (b) a statement as to the truth of the representation, (c) any other matter required by the rules.'

10. *Criminal Procedure Act 1986* (NSW) s 291 'Proceedings must be held in camera when complainant gives evidence. (1) Any part of any proceedings in respect of a prescribed sexual offence in which evidence is given by a complainant is to be held in camera, unless the court otherwise directs. (2) This section applies even if the complainant gives evidence by means of closed-circuit television or other technology or under any alternative arrangements available to the complainant under section 294B or under Part 6. (3) The court may direct that the part of proceedings in which evidence is given by the complainant be held in open court only at the request of a party to the proceedings and only if the court is satisfied that: (a) special reasons in the interests of justice require the part of the proceedings to be held in open court, or (b) the complainant consents to giving his or her evidence in open court.'
11. *Criminal Procedure Act 1986* (NSW) s 293 'Admissibility of evidence relating to sexual experience. (1) This section applies to proceedings in respect of a prescribed sexual offence. (2) Evidence relating to the sexual reputation of the complainant is inadmissible. (3) Evidence that discloses or implies: (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or (b) has or may have taken part or not taken part in any sexual activity, is inadmissible.'
12. *Criminal Procedure Act 1986* (NSW) s 294 'Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings. (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest: (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or (b) delay by that person in making any such complaint. (2) In circumstances to which this section applies, the Judge: (a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and (b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and (c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.'
13. *Criminal Procedure Act 1986* (NSW) s 294AA 'Warning to be given by Judge in relation to complainants' evidence. (1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses. (2) Without

limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.'

14. *Criminal Procedure Act 1986* (NSW) s 294A 'Arrangements for complainant in prescribed sexual offence proceedings giving evidence when accused person is unrepresented. (1) This section applies to proceedings in respect of a prescribed sexual offence during which the accused person is not represented by an Australian legal practitioner. (2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court. (3) The person appointed by the court is to ask the complainant only the questions that the accused person requests that person to put to the complainant. (4) Any such person, when acting in the course of an appointment under this section, must not independently give the accused person legal or other advice.'
15. *Criminal Procedure Act 1986* (NSW) s 294B 'Giving of evidence by complainant in prescribed sexual offence proceedings-alternative arrangements. (1) This section applies to evidence given in proceedings (including a new trial) in respect of a prescribed sexual offence. (1A) This section applies (with any necessary modifications) to the giving of evidence in apprehended violence order proceedings (within the meaning of the Crimes (Domestic and Personal Violence) Act 2007) by a protected person in the same way as it applies to the giving of evidence in criminal proceedings by a complainant but only if: (a) the defendant in the proceedings is a person who is charged with a prescribed sexual offence, and (b) the protected person is the alleged victim of the offence. (2) This section does not apply to or in respect of the giving of evidence by a vulnerable person if Division 4 of Part 6 applies to the giving of that evidence. (2A) This section applies in addition to Part 4B, if the complainant is a domestic violence complainant. (3) A complainant who gives evidence to which this section applies is entitled (but may choose not): (a) to give that evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom, or (b) to give that evidence by use of alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused person or any other person or persons in the courtroom, including the following: (i) use of screens, (ii) planned seating arrangements for people who have an interest in the proceedings (including the level at which they are seated and the people in the complainant's line of vision).'

16. *Criminal Procedure Act 1986* (NSW) s 294C 'Complainant entitled to have support person or persons present when giving evidence. (1) A complainant is entitled to have a person or persons chosen by the complainant present near the complainant, and within the complainant's sight, when the complainant is giving evidence in proceedings in respect of a prescribed sexual offence. (2) The entitlement applies: (a) even if the complainant gives evidence by means of closed-circuit television or other technology or under any alternative arrangements available to the complainant under section 294B or Part 6, and (b) even if the proceedings, or the part of the proceedings in which the complainant gives evidence, are held in camera. (3) Without limiting the entitlement of a complainant under this section, the person or persons chosen by the complainant to be with the complainant when he or she gives evidence may include a parent, guardian, relative, friend or support person of the complainant, or a person assisting the complainant in a professional capacity. (4) An accused person is not entitled to object to the suitability of the person or persons chosen by a complainant to be with the complainant when giving evidence, and the court is not to disallow the complainant's choice of person or persons on its own motion, unless the complainant's choice is likely to prejudice the accused person's right to a fair trial (e.g., because the person chosen by the complainant is a witness or potential witness in the proceedings).'
17. *Criminal Procedure Act 1986* (NSW) s 306B 'Admission of evidence of complainant in new trial proceedings. (1) If a person is convicted of a prescribed sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant.'
18. *Criminal Procedure Act 1986* (NSW) s 306B 'Definitions. (1) In this Part: 'vulnerable person' means a child or a cognitively impaired person. (2) For the purposes of this Part, a 'cognitive impairment' includes any of the following: (a) an intellectual disability, (b) a developmental disorder (including an autistic spectrum disorder), (c) a neurological disorder, (d) dementia, (e) a severe mental illness, (f) a brain injury.'
19. *Criminal Procedure Act 1986* (NSW) s 306U 'Vulnerable person entitled to give evidence in chief in form of recording. (1) A vulnerable person is entitled to give, and may give, evidence in chief of a previous representation to which this Division applies made by the person wholly or partly in the form of a recording made by an investigating official of the interview in the course of which the previous representation was made and

that is viewed or heard, or both, by the court. The vulnerable person must not, unless the person otherwise chooses, be present in the court, or be visible or audible to the court by closed-circuit television or by means of any similar technology, while it is viewing or hearing the recording.'

20. *Criminal Procedure Act 1986* (NSW) s 306ZB 'Vulnerable persons have a right to give evidence by closed-circuit television. (1) Subject to this Part, a vulnerable person who gives evidence in any proceeding to which this Division applies is entitled to give that evidence by means of closed-circuit television facilities or by means of any other similar technology prescribed for the purposes of this section. (2) Subject to subsections (4) and (5), a child who is 16 or more but less than 18 years of age at the time evidence is given in a proceeding to which this Division applies is entitled to give the evidence as referred to in subsection (1) if the child was under 16 years of age when the charge for the personal assault offence to which the proceedings relate was laid. (3) A vulnerable person may choose not to give evidence by the means referred to in subsection (1). (4) A vulnerable person must not give evidence by means of closed-circuit television facilities or any other prescribed technology if the court orders that such means not be used. (5) The court may only make such an order if it is satisfied that there are special reasons, in the interests of justice, for the vulnerable person's evidence not to be given by such means.'
21. *Criminal Procedure Act 1986* (NSW) s 306ZB. '(2) In such a proceeding, the court must make alternative arrangements for the giving of evidence by the vulnerable person, in order to restrict contact (including visual contact) between the vulnerable person and any other person or persons. (3) Those alternative arrangements may include any of the following: (a) the use of screens, (b) planned seating arrangements for people who have an interest in the proceeding (including the level at which they are seated and the people in the vulnerable person's line of vision), (c) the adjournment of the proceeding or any part of the proceeding to other premises.'
22. *Criminal Procedure Act 1986* (NSW) s 306ZB. '(2) A vulnerable person who gives evidence in a proceeding to which this section applies is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence. (3) Without limiting a vulnerable person's right to choose such a person, that person: (a) may be a parent, guardian, relative, friend or support person of the vulnerable person, and (b) may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving

evidence associated with an impairment or a disability, or for the purpose of providing the vulnerable person with other support.'

23. *Criminal Procedure Act 1986* (NSW) s 306ZL 'Vulnerable persons have a right to alternative arrangements for giving evidence when accused is unrepresented. (1) This section applies to a criminal proceeding in any court, or a civil proceeding arising from the commission of a personal assault offence, in which the accused or defendant is not represented by an Australian legal practitioner. (2) A vulnerable person who is a witness (other than the accused or the defendant) in a proceeding to which this section applies is to be examined in chief, cross-examined or re-examined by a person appointed by the court instead of by the accused or the defendant. (3) If any such person is appointed, that person is to ask the vulnerable person only the questions that the accused or the defendant requests the person to put to the vulnerable person.'
24. *Criminal Procedure Act 1986* (NSW) s 306U. '(3) If a vulnerable person who gives evidence as referred to in subsection (1) is not the accused person in the proceeding, the vulnerable person must subsequently be available for cross-examination and re-examination: (a) orally in the courtroom, or (b) if the evidence is given in any proceeding to which Division 4 applies, in accordance with alternative arrangements made under section 306W.'
25. *Criminal Procedure Act 1986* (NSW) s 306Y 'Evidence not to be given in form of recording if contrary to interests of justice. (1) A vulnerable person must not give evidence by means of a recording made by an investigating official in accordance with this Division if the court orders that such means not be used. (2) The court may only make such an order if it is satisfied that it is not in the interests of justice for the vulnerable person's evidence to be given by a recording.'
26. *Criminal Procedure Act 1986* (NSW) s 3275B 'Witness with communication difficulty entitled to assistance from person or communication aid. (1) In any criminal proceedings, a witness who has difficulty communicating is entitled to use a person or persons who may assist the witness with giving evidence, but only if the witness ordinarily receives assistance to communicate from such a person or persons on a daily basis. (2) In any criminal proceedings, a witness who has difficulty communicating is entitled to use a communication aid to assist the witness with giving evidence, but only if the witness ordinarily uses such an aid to assist him or her to communicate on a daily basis. (3) To the extent that the court considers it reasonable to do so, the court must make

whatever direction is appropriate to give effect to a witness' right to use a person or persons, or to use a communication aid, under this section when the witness is giving evidence. (4) The provisions of the Evidence Act 1995 apply to and in respect of a person who gives witness assistance under this section in the same way as they apply to and in respect of an interpreter under that Act. (5) In this section: 'communication aid' includes anything, whether electronic or otherwise, that can be used to assist in communication.'

27. Lay judges must be Italian citizens, be between 30 and 65 years of age, enjoy full political and civil rights, be of good moral character, have attained a lower mid-school certificate for the *Corte d'Assises*, or a higher mid-school certificate for the *Corte d'Assise d'Appello* (see Di Amato 2011: 28).
28. See, for instance, the processes regarding victim participation in German and French criminal procedure, which affords the victim greater levels of support throughout the policing and prosecution process. While it may not be that victims are afforded greater processes per se, better and more integrated support might mean that by comparison the Italian process is not as inclusive of the victim, despite a criminal procedure to the contrary. See Kury and Kichling (2011).

5

Sentencing

Sentencing and the Centrality of the Victim

The sentencing process has been significantly modified to account for the interests of the victim. This chapter will examine the introduction of statutory frameworks for the taking into account of harm occasioned to the victim and community, VIS's, CIS's, the significance of general harm caused by an offence, and the need to focus on denunciation, deterrence, and retribution as principles of sentencing, and the role of restorative and therapeutic interventions in the sentencing process. Collectively, these movements in sentencing procedure have repositioned the victim in the sentencing hearing in a way that substantially shifts the focus toward the victim and the harm occasioned to them. Although the sentencing process is still in favour of the accused, where evidence in mitigation of sentence is required to be established on the balance of probabilities, and where facts in aggravation must continue to be established beyond reasonable doubt, the victim has a more prominent role in proceedings due to the gradual movement toward enforceable rights of a substantive character.

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Rules regarding the requirement to consider certain harms to the victim as aggravating factors, or injuries and trauma experienced by the victim, have come to characterise the sentencing law of various common law jurisdictions, internationally. While statutory construction varies, these jurisdictions draw from the common law requirement that a sentence be constructed in terms of the objective seriousness of the offence, which ordinarily includes a reflection of the general harm occasioned to both the victim and the broader community. Sentencing law also requires that specific harms and injuries occasioned on the victim and foreseeable to the accused at the time of the offence are also factored into the sentence (see generally, Ashworth and Roberts 2012; Doak et al. 2009).

Victim impact statements emerged in the 1980s and found their way into sentencing statutes in the 1990s. Parliaments across the common law world began prescribing the form and content of such statements, in addition to the offences and proceedings to which they applied (see Ashworth 1993). Originally prescribed for sex offences and then most serious indictable offences, VISs have since been delimited and are available for most offences involving violence for matters heard summarily or by indictment. VISs allow the victim to participate in the sentencing hearing by presenting a statement that attests to the harms, injuries, and trauma they have suffered as a result of the offence. While such evidence has been controversial, and not always taken into account in sentencing for that reason, most jurisdictions have now progressed to a position of granting courts the discretion to draw from the content of the impact statement when sentencing an offender. The movement toward VISs demonstrates a key movement toward the provision of substantive rights for victims, which are now enforceable to the extent that courts must allow a victim to make a statement and receive it into evidence. However, the court retains discretion to take the content of the statement into account in sentencing.

Community impact statements are a recent addition to the complement of sources of information and evidence that may be considered by a sentencing court. Community statements differ from victim statements in that they are drafted by a community representative or officeholder, such as a police officer, a local mayor or an individual as prescribed by statute. The purpose of the community statement is to phrase the harm, damage

or consequences of an offence in the community context. Although no one individual victim perspective informs the statement, such statements are able to represent how certain members of the community or the community-at-large may be victimised by an offender or offence.

The move to reposition the victim in restorative justice was covered in Chap. 3. However, such programs seek to modify the sentencing process by allowing for deferral of sentence and for the therapeutic outcomes for offender and victim to be factored into sentence. This section draws from the material covered in Chap. 3 by demonstrating how restorative intervention may be factored into a proportionate sentence. Although the process of intervention should lead to a discounted sentence and better outcomes for offender and victim, courts must be cautious in their estimation of the benefits of restorative intervention, especially for more serious offending such as sex offending.[1] For more minor to mid-level offending, such as that which may lead to participation in a Circle or Forum Sentencing program, deferral of sentence for therapeutic intervention may prove quite determinative. Victim participation is therefore an important element in a program of therapeutic intervention that assists the court's understanding of the offender's rehabilitation, or prospects of further rehabilitation.

Harm to the Victim and the Community

Victims were further empowered by the introduction of mandatory considerations on the harm done to the victim in sentencing law. While sentencing courts have long been able to consider the harm done to the victim at common law, legislative changes in the 1990s saw the introduction of mandatory tests for harm and, in certain jurisdictions, for standard minimum non-parole periods or head sentences where certain types of harm are occasioned. Although the victim does not possess a right to determine the non-parole period, policy may prescribe a process to allow the views of the victim to be taken into account where relevant. *McCourt v United Kingdom* (1993) 15 EHRR CD 110 ruled that the rights of the victim do not extend to determinations of the minimum term of imprisonment before which an offender may be released on licence at par [1]:

> The Commission notes that while the applicant has no 'right' as such to be involved in the parole process the Home Office have a policy of accepting the submissions made by victims' families and placing them before the Parole Board. The Home Office also has a policy of informing relatives of the possible release of a prisoner in order to meet any concerns that they might have. As regards the failure to involve the applicant in setting the tariff, the Commission also recalls the explanation by the Home Office that victims' families do not have the requisite impartiality for involvement in the sentencing procedures. In light of these considerations, the Commission finds that the applicant's complaints fail to disclose any lack of respect for or any interference with her right to respect for family life.

The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the sentencing court must recognise the harm done to the victim and the community, as well as specific aggravating circumstances, under ss 3A(g) and 21A respectively. While these requirements of sentencing are not strictly rights assigned to the victim, and thus are not rights that can be enforced by the victim personally, they do provide statutory requirements to which sentencing courts must make explicit reference when sentencing. Where sentencing courts fail to pay regard to the harm to the victim, the Court of Criminal Appeal will intervene and resentence the accused.

Similarly, appeal courts will not interfere with a sentence where the accused contends that the sentencing judge considered general harm that was an expected but otherwise not exceptional result of the offence. In *Shane Stewart Josefski v R* (2010) NSWCCA 41, the court ruled that the sentencing court did not err by taking into account harm to the victim that was expected as a result of the offence.

> In respect of the break and enter offence the complaint is that his Honour erred in taking into account as aggravating factors that the emotional harm to Ms Wickham was substantial and that the offence was committed in the presence of a child under the age of 18 years …
>
> But there is no general principle that injuries to a victim should be ignored or discounted because they are no more than would be expected as the result of the crime committed upon that type of victim. In a sentencing decision considered by this Court on a Crown appeal, although the Crown

> did not raise the point, a Judge refused to take into account the injuries suffered by an 80 year old rape victim because they were what would be expected of such a victim who suffered such an attack. The absurdity of such an approach must be apparent. The Court has no knowledge of how a victim of rape of that age might react to the offence. It can be predicted that it is likely to be severe, but why for that reason should the effect on the victim be disregarded?
>
> In this case the Judge was entitled to take into account the emotional injuries suffered by Ms Wickham, even though it could be predicted that any female in her situation, particularly having a young child under her protection, would be traumatised by the events of that evening. The first complaint should be dismissed. (*Shane Stewart Josefski v R* (2010) NSWCCA 41, [17]; [46–47])

The legislation that refers sentencing courts to harm to the victim generally or to specific types of aggravated harm does not displace reference to harm to the victim as a common law consideration. The legislation builds upon the common law, in that it determines as relevant those specific, additional, or unexpected harms occasioned to the victim, which may aggravate sentence. Sentencing courts therefore need to be mindful that the requirements of any statutory reference to the victim do not displace the common law requirement that allows expected or notional harm to be factored into a proportionate sentence.

The types of harm that are identified by statute vary widely across common law jurisdictions. Generally, legislative reform of the sentencing process now requires courts to consider the interests of the victim and community, circumstances of aggravation, to fix a sentence with reference to minimum terms or average non-parole periods for prescribed offences, and to balance the rights of the accused in the sentencing process. Circumstances of aggravation refer to particular individuals or injuries, for instance, and include reference to vulnerable victims such as children or the cognitively impaired, or those persons under the care of the offender. Higher standard non-parole periods are prescribed where the victim is a person of status, such as a judicial officer, a police officer, or public official. Truth in sentencing legislation requires that offenders be sentenced with regard to prescribed non-parole periods as set by individual offence. Collectively,

these statutory amendments provide a framework through which courts are reminded of the interests of the victim, and it is incumbent on the court to factor these requirements into the setting of a proportionate, objectively phrased, sentence.

The *Criminal Justice Act 2003* (UK) s 143 provides that the determination of offence seriousness requires the court to consider harm caused by the offence, foreseeable to the accused, at the time of the offence:

> s 143 Determining the seriousness of an offence
>
> (1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might forseeably have caused.

Sentencing in England and Wales, much like other common law jurisdictions, relies on the common law to provide guidance as to what constitutes harm in any given case.[2] This will ordinarily regard a range of factors that phrase the seriousness of the offence and culpability of the offender. The injuries and trauma caused by the accused, foreseeable to them at the time of the offence, will ordinarily provide a base reference by which this seriousness is construed. Other factors that will influence the objective seriousness will include the offence charged and the maximum sentence available to the court. Aggravating and mitigating factors may then be applied to increase or reduce the level of seriousness in order to determine the proportionate sentence for the accused.[3]

In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A provides specific reference to the harm occasioned to victims and the community, although the actual way in which this may be factored into a sentence is generally left to the discretion of the sentencing court:

> s 3A The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and the community.

Section 3A may be applied in the context of general harm to the victim and community, but may also be construed in terms of prescribed aggravating factors as provided by statute. In England and Wales, the *Criminal Justice Act 2003* (UK) provides this in terms of especially aggravating circumstances that include crimes that involve racial and religious aggression and crimes related to disability and sexual orientation:

s 145 Increase in sentences for racial or religious aggravation

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the *Crime and Disorder Act 1998* (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

(2) If the offence was racially or religiously aggravated, the court:

(a) must treat that fact as an aggravating factor, and
(b) must state in open court that the offence was so aggravated.

And for disability and sexual orientation as follows:

s 146 Increase in sentences for aggravation related to disability or sexual orientation

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are:

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated toward the victim of the offence hostility based on:

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) a disability (or presumed disability) of the victim, or

(b) that the offence is motivated (wholly or partly):

(i) by hostility toward persons who are of a particular sexual orientation, or
(ii) by hostility toward persons who have a disability or a particular disability.

(3) The court:

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
(b) must state in open court that the offence was committed in such circumstances.

In NSW, the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A sets out numerous circumstances of aggravation that the court must take into account where relevant to an offence:

s 21A Aggravating, mitigating and other factors in sentencing

(1) General In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) Aggravating factors. The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public

or community functions and the offence arose because of the victim's occupation or voluntary work,

(b) the offence involved the actual or threatened use of violence,

(c) the offence involved the actual or threatened use of a weapon,

(ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,

(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,

(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),

(e) the offence was committed in company,

(ea) the offence was committed in the presence of a child under 18 years of age,

(eb) the offence was committed in the home of the victim or any other person,

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(ia) the actions of the offender were a risk to national security (within the meaning of the National Security Information (Criminal and Civil Proceedings Act 2004 of the Commonwealth),

(ib) the offence involved a grave risk of death to another person or persons,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occu-

pation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,
(n) the offence was part of a planned or organised criminal activity,
(o) the offence was committed for financial gain,
(p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

Legislation also prescribes the setting of the non-parole period, the period of compulsory imprisonment before which licence to remain in the community cannot be granted by the Parole Board. This legislation was introduced in NSW and elsewhere (unless otherwise provided by mandatory minimum terms) in reference to a 'truth in sentencing' regime in order to standardise the setting of the non-parole and head sentence by courts, and to encourage courts to begin the sentencing exercise by reflecting of the totality of offence seriousness and proportionality of the non-parole period to that totality. The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A provides the calculus by which this period is to be determined:

s 54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.

In addition to a prescribed formula for the setting of a sentence, courts are increasingly informed by prescribed standard non-parole periods: In NSW, this takes the form of a table of standard periods as prescribed by offence. With particular reference to those offences of specific intent

where the outcome of the criminal incident is known to the accused at the time of the commission of the offence (drug and possess firearms offences omitted) (Table 5.1):

While the table of non-parole periods is extensive, the number of offences demonstrate how parliament has continued to provide reference to standard periods of imprisonment for offences where there is a clearly actualised victim and where the outcome of the criminal incident is likely to be known to the accused at the time of commissioning the offence.[4] Although courts can depart from the standard non-parole period where circumstances require a proportionate sentence be set, by taking account of mitigating or other factors that decrease objective seriousness, the intent of parliament is that these periods are adhered to when sentencing. The courts have demonstrated that despite the controversial nature of fettering the discretion of the court to determine a sentence using the intuitive synthesis method, and of following a law and order politics by

Table 5.1 Table of Standard Non-Parole Periods in NSW

Item no.	Offence	Standard Non-Parole Period
1A	Murder-where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years
1B	Murder-where the victim was a child under 18 years of age	25 years
1	Murder-in other cases	20 years
2	Section 26 of the *Crimes Act 1900* (conspiracy to murder)	10 years
3	Sections 27, 28, 29 or 30 of the *Crimes Act 1900* (attempt to murder)	10 years
4	Section 33 of the *Crimes Act 1900* (wounding etc. with intent to do bodily harm or resist arrest)	7 years
4AA	Section 33A (1) of the *Crimes Act 1900* (discharging a firearm with intent to cause grievous bodily harm)	9 years
4AB	Section 33A (2) of the *Crimes Act 1900* (discharging a firearm with intent to resist arrest or detention)	9 years

(continued)

Table 5.1 (continued)

Item no.	Offence	Standard Non-Parole Period
4A	Section 35 (1) of the *Crimes Act 1900* (reckless causing of grievous bodily harm in company)	5 years
4B	Section 35 (2) of the *Crimes Act 1900* (reckless causing of grievous bodily harm)	4 years
4C	Section 35 (3) of the *Crimes Act 1900* (reckless wounding in company)	4 years
4D	Section 35 (4) of the *Crimes Act 1900* (reckless wounding)	3 years
5	Section 60 (2) of the *Crimes Act 1900* (assault of police officer occasioning bodily harm)	3 years
6	Section 60 (3) of the *Crimes Act 1900* (wounding or inflicting grievous bodily harm on police officer)	5 years
7	Section 61I of the *Crimes Act 1900* (sexual assault)	7 years
8	Section 61 J of the *Crimes Act 1900* (aggravated sexual assault)	10 years
9	Section 61JA of the *Crimes Act 1900* (aggravated sexual assault in company)	15 years
9A	Section 61 M (1) of the *Crimes Act 1900* (aggravated indecent assault)	5 years
9B	Section 61 M (2) of the *Crimes Act 1900* (aggravated indecent assault)	8 years
10	Section 66A of the *Crimes Act 1900* (sexual intercourse-child under 10)	15 years
10A	Section 66B of the *Crimes Act 1900* (attempt, or assault with intent, to have sexual intercourse with a child under 10 years)	10 years
10B	Section 66C (1) of the *Crimes Act 1900* (sexual intercourse with a child 10–14 years)	7 years
10C	Section 66C (2) of the *Crimes Act 1900* (aggravated sexual intercourse with a child 10–14 years)	9 years
10D	Section 66C (4) of the *Crimes Act 1900* (aggravated sexual intercourse with a child 14–16 years)	5 years
10E	Section 66 EB (2) of the *Crimes Act 1900* (procure a child under 14 years for unlawful sexual activity)	6 years
10 F	Section 66 EB (2) of the *Crimes Act 1900* (procure a child 14–16 years for unlawful sexual activity)	5 years
10G	Section 66 EB (2A) of the *Crimes Act 1900* (meet a child under 14 years following grooming)	6 years
10H	Section 66 EB (2A) of the *Crimes Act 1900* (meet a child 14–16 years following grooming)	5 years

(continued)

Table 5.1 (continued)

Item no.	Offence	Standard Non-Parole Period
10I	Section 66 EB (3) of the *Crimes Act 1900* (groom a child under 14 years for unlawful sexual activity)	5 years
10 J	Section 66 EB (3) of the *Crimes Act 1900* (groom a child 14–16 years for unlawful sexual activity)	4 years
10 K	Section 91D (1) of the *Crimes Act 1900* (induce a child under 14 years to participate in child prostitution)	6 years
10 L	Section 91E (1) of the *Crimes Act 1900* (obtain benefit from child prostitution, child under 14 years)	6 years
10 M	Section 91G (1) of the *Crimes Act 1900* (use a child under 14 years for child abuse material purposes)	6 years
10 N	Section 93GA (1) of the *Crimes Act 1900* (fire a firearm at a dwelling-house or other building with reckless disregard for the safety of any person)	5 years
10O	Section 93GA (1A) of the *Crimes Act 1900* (fire a firearm, during a public disorder, at a dwelling-house or other building with reckless disregard for the safety of any person)	6 years
10P	Section 93GA (1B) of the *Crimes Act 1900* (fire a firearm, in the course of an organised criminal activity, at a dwelling-house or other building with reckless disregard for the safety of any person)	6 years
11	Section 98 of the *Crimes Act 1900* (robbery with arms etc. and wounding)	7 years
12	Section 112 (2) of the *Crimes Act 1900* (breaking etc. into any house etc. and committing serious indictable offence in circumstances of aggravation)	5 years
13	Section 112 (3) of the *Crimes Act 1900* (breaking etc. into any house etc. and committing serious indictable offence in circumstances of special aggravation)	7 years
14	Section 154C (1) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board)	3 years
15	Section 154C (2) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5 years
15A	Section 154G of the *Crimes Act 1900* (organised car or boat rebirthing activities)	4 years
15B	Section 203E of the *Crimes Act 1900* (bushfires)	5 years

allowing a sentence to be increased by reference to a determinative period of imprisonment, courts are unwilling to depart from the table of standard periods unless substantial circumstances warrant such departure.

The willingness of the NSW Parliament to prescribe determinative sentences out of recognition of particularly harmful or dangerous acts, or to appease public disquiet for crime control, is increasingly evident through the development of new sentencing terms that fix minimum mandatory sentences. Chapter 1 discussed the killing of Thomas Kelly and the resultant avalanche of law reform that followed. One aspect of the reform included the extension of the offence of assault occasioning actual bodily harm to include an especially aggravated offence where the offender assaults causing death where, at the time of the offence, the offender is intoxicated. This offence was inserted into the criminal law of NSW as a direct response to the death of Thomas Kelly and the deemed inadequate accumulated head sentence of 7 years and 2 months imprisonment, with a non-parole period of 5 years and 2 months, to which his offender was originally sentenced.[5] This sentence was quashed by the New South Wales Court of Criminal Appeal (NSWCCA) for a new accumulated head sentence of 13 years and 8 months on appeal.

The course of law reform that resulted followed public disquiet as to the inadequacy of sentencing for such unprovoked, violence offences, including the need to specifically deter the offender and public generally from like offending. The sentencing court's perceived lack of awareness of the level of seriousness of the offence and the outrage that followed created opportunities for law reform that went well beyond the introduction of new offences and sentences.[6] The courts in England and Wales are also familiar with such unprovoked, intoxicated offending. In *R v Duckworth* (2013) 1 Cr App R(S) 83, Cox J (Rafferty LJ and Bevan QC agreeing) said at pars [12–14]:

> Both parties have drawn our attention to decisions of this Court in a number of cases involving facts where death had resulted from a single blow with a bare hand or fist. These cases include, on Miss Pinkus' part, the case of *Furby* [2005] EWCA Crim 3147; [2006] 2 Cr App R(S) 8 (p. 64), *Attorney General's Reference (Nos. 60, 62 and 63 of 2009) (Declan Appleby)*

> [2009] EWCA Crim 2693; [2010] 2 Cr App R(S) 46 (p. 3110) and *Attorney General's Reference (No. 64 of 2008) (Wyatt)* [2009] EWCA Crim 88; [2009] EWCA Crim 88; [2009] 2 Cr App R(S) 59 (p. 424).
>
> As the judgments in these cases make clear, the category of offences subsumed under the general heading of 'one-punch manslaughter' will invariably include cases where the level of force used and the circumstances surrounding the blow render them particularly serious cases of their kind, even though the consequences must be treated as if they were unintentional and unintended.
>
> This, in our judgment, is such a case. Although this incident was one of short duration, it was not a spontaneous incident. This was, as the sentencing judge observed, a case involving gratuitous violence used in the street and an attack of considerable ferocity against a wholly innocent victim. The offence was aggravated by the appellant's previous convictions for offences of violence and for public disorder. This was, therefore, a most serious offence of its kind.

The offence of assault causing death is now especially aggravated where the offender is of or above the age of 18 years and kills by assault whilst intoxicated. Police are able to test for intoxication at the scene or following arrest. Where the accused is intoxicated at the prescribed level, the offender will be charged under s 25A of the *Crimes Act 1900* (NSW), which carries a maximum sentence of 25 years' imprisonment. Where faced with such a charge, s 25AA(1) requires that:

> A court is required to impose a sentence of imprisonment of not less than 8 years on a person guilty of an offence under section 25A (2). Any non-parole period for the sentence is also required to be not less than 8 years.

The controversial nature of such controls on juridical discretion was justified by the NSW Parliament out of recognition of the need for courts to regard certain types of offending as being of a specific level of objective seriousness. This level of seriousness, and the suspicion that the courts tended toward lower than expected sentences, warranted the setting of a minimum mandatory term for the protection of victims otherwise going about their business.

Victim Impact Statements

The first inroads to substantive participation for victims were in the form of processes that allowed for the presentation of an impact or personal statement, after conviction but before sentencing. Such schemes were introduced into legislation in the 1990s, although courts were accepting VISs from sex offences victims in the 1980s. Impact statements were initially limited to serious offences of interpersonal violence—homicide, rape, and serious assaults heard on indictment. The availability of VIS for minor offences or for summary proceedings followed. Impact statements demonstrate the movement of victim rights from procedural to substantive rights, in that courts were initially reluctant to accept evidence in the form of an unsworn statement from the perspective of the victim. Although courts could take the content of such statements into account in their discretion, VIS originally tended to avail itself as a process that afforded the victim some degree of personal, perhaps therapeutic, participation over substantive input into proceedings.

Early research into the reception of VIS indicates that judges tolerated such statements out of respect for the victim and the perceived therapeutic benefits it delivered (Erez 2004). Over time, following successive appeals on the admissibility of VIS and its veracity as a mode of evidence, sentencing courts began to take aspects of victim statements into account in sentence. While this was true for non-fatal and in particular sex offences where harms are ongoing post-offence, courts have been reluctant to utilise impact evidence when supplied by family members in homicide cases.

However, in 2014, NSW permitted for the first time the taking into account of a VIS prepared by a family member in a homicide case. The 2014 amendments set aside the common law ruling of *R v Previtera* (1997) 94 A Crim R 76 prohibiting the taking into account of VIS prepared by family members of the deceased.[7] Section 28(4) of *the Crimes (Sentencing Procedure) Act 1999* (NSW) now provides:

> A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of

the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.

With leave of the prosecutor and court, and subject to the law of evidence, NSW family members now enjoy substantive rights to justice by permitting the court to take account of the harm occasioned to them as members of the community. Although courts will only take account of such harms in its discretion, this raises the standing and dignity of family victims to holders of substantive, enforceable rights. Once victims acquired the right to have their statement taken into account in sentence, victims gained a right that bore substantive relevance to the sentencing decision being made, even though that right was not exercised to the point where an actual substantive impact was made on sentence, in every case.[8]

Community Impact Statements

The prevalence of domestic violence offending and the significant role the courts must play in the denunciation and deterrence of such violence provides one context in which community impact evidence has been increasingly relied upon (Webster 2011). Other categories of offending that call for a strong community focus include public disorder, antisocial behaviour, and fatal and non-fatal interpersonal violence, within specific communities or society generally. Advocates of community impact evidence argue that such statements increase judicial awareness of the need for targeted sentencing, by considering the appropriateness of lengthier prison terms, rehabilitation programs, or alternative options such as offender intervention, to provide a proportionate response to the threat presented by the offence and to enhance the likelihood of deterring similar offending. The general benefit of the use of CISs is that they may furnish the sentencing court with information or evidence on the consequences of particular types of offending and the vulnerabilities of particular groups or communities to that offending. The impact of crime in a broader social context, including underlying social conditions and

factors that increase the risk of offending, may also be commented upon. Community impact statements may be particularly important where the sentencing court may otherwise not be aware of such antecedent conditions and consequences, despite occasional use across sentencing courts. Community statements may therefore be an important supplement assisting the court in its duty to construe harms and set a proportionate sentence.

Community statements inform the court of the impact of a crime on the community, phrasing the harm to the community in the context of specific or general harms that can be addressed by the sentence in an explicit way. Unlike victim impact statements, which tender evidence on the harm and trauma experienced by the primary victim, or their family where the primary victim is deceased, community statements tend to be adduced by particular persons appointed by the state, usually prescribed by statute. The use of community statements in the sentencing process thus modifies sentencing procedure by calling for new forms of evidence, as tendered by community representatives or officeholders, such as the Commissioner of Victims' Rights in South Australia.[9] Although some jurisdictions depart from this requirement, by allowing the police to draft and tender such a statement after collecting community perspectives on the offences complained of,[10] the trend is to appoint a public official who is then taken as representing or expressing the views of the community in an authoritative way.

This develops sentencing procedure by strengthening the capacity of the public prosecutor to express the consequences of the offence from the perspective of the community. While victim impact evidence has tended to be met with scepticism in this regard, as potentially distracting from the objectivity of the sentencing process by introducing the personal perspectives of the victim (see Ashworth 1993; cf. Erez 2004), community impact statements have avoided such criticisms because they are drafted by publically recognised officials. Although Commissioners of Victims' Rights are taken to support victim interests generally, they are not seen to represent the interests of any one particular victim or group, and thus the criticisms of victim impact evidence are largely overcome.[11] The issue of subjective interests will continue to plague family statements, and courts must take particular care to isolate

trauma contained in these statements as representative expressions of harm to the community.

The requirements of proportionate sentencing mean that the use of community impact evidence by a sentencing court fits well where the court is charged with considering harms that extend beyond the circumstances of the particular case at hand. Where the facts suggests that the offence is endemic, easily repeated, or of such significant consequence to the community that there may be ongoing trauma to the community, the sentencing court will be required to consider the need to denounce the offending and deter others from committing like offences. England and Wales differentiate such statements between generic and specific, both drafted by police following community consultation (CPS 2015). The former sets out a range of offences deemed by the community to be of special concern, while the latter sets out specific offences that may threaten or harm individual local communities, or members of a particular local community. South Australia similarly differentiates between neighbourhood and social impact statements, depending on the localisation of harm and identification of an at-risk community group.[12] Although not all jurisdictions differentiate between statements, their use will similarly inform a court of the consequences of offences from a community viewpoint where deemed relevant to the construction of a proportionate sentence. Where courts have adduced community statements they have tended to draw from their content in the context of those rationales of sentencing that phrase sentencing in an objective way. This follows the context of community statements as setting out harm to the community in a general way.

Community impact evidence may be drafted by whoever is appointed to do so by law or statute. Often this will be an officeholder that is appointed to represent the perspective of the community, as is the case in South Australia, but may be a police officer, as in England and Wales,[13] or other public official such as a local mayor or senior police officer, or as now prescribed by procedures established by a program designated by the Lieutenant Governor in Council, or executive, of the province in which the court exercises jurisdiction, as found in Canada since the introduction of the *Victims Bill of Rights Act 2015* (Can).[14] In England and Wales, community impact statements follow a similar course as the Victim Personal

Statement (VPS). Either statement may be taken during the investigative phase or later, and will accompany the case file that may then be read by prosecutors and court, up to the appellate levels. There is no separate process for the submission of a community impact statement during sentencing. Rather, community impact evidence is received as a statement relevant to the sentencing exercise. Although it may exist in evidence prior to sentencing, it is likely to be tendered during sentencing given its potential relevance to the sentencing process. Where a statement has not already been drafted, the police or prosecutor may seek to draft one specifically for sentencing. This is particularly likely where the offence has had a significant impact on community safety or public order. The community impact statement is thus taken as proof by written statement and is drafted and adduced pursuant to s 9 of the *Criminal Justice Act 1967* (UK) and tendered under pt 27 of the *Criminal Procedure Rules 2010* (UK).

The reforms to the Canadian Criminal Code introduced by the *Victims Bill of Rights Act 2015* (Can) allow for the tenure of community impact evidence across all criminal offences. Section 722.2(1) of the Criminal Code now states:

> When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement made by an individual on a community's behalf that was prepared in accordance with this section and filed with the court describing the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.

The case law on community impact statements in England and Wales demonstrates their use as evidence for the deterrence and denunciation of the offending behaviour and of the offender themselves. *Blackshaw (and Ors) v R* (2012) 1 Cr App R(S) 114 is an appeal arising out of sentences imposed on a number of offenders who participated in the riots that took place across England on 6–11 August 2011. Offenders variously engaged in acts of public disorder, property damage, larceny, and theft. Several community impact statements were adduced at the time of sentencing, each indicating damage done to particular cities or boroughs. The statement adduced for the City of London remarked at par [49]:

> Although at first the violent disorder was directed at police officers, with over 100 officers being injured over the 3 nights, it quickly became focussed on business premises and residential properties within the areas affected. Many commercial premises were either ransacked by looters or set ablaze by arsonists. Many homes were broken into by marauding gangs intent on burglary. Many vehicles were also stolen and then set alight during the violent disorder. Some of these fires quickly became out of control, spreading to residential premises and flats above business premises, endangering life and leaving many local people homeless. Although no specific community groups have been targeted in the attacks, members of the public have been injured and tragically an elderly male lost his life in Ealing as a result of the disturbances.

The Lord Chief Justice of England and Wales, dismissing some appeals while upholding others, referred to the constitutive principles of sentencing for such offences at par [3–4]:

> Before we summarise something of the ghastliness inflicted on a variety of different neighbourhoods subjected to public disorder, and dealing with the individual appeals, we shall identify the applicable sentencing principles.
>
> There is an overwhelming obligation on sentencing courts to do what they can to ensure the protection of the public, whether in their homes or in their businesses or in the street and to protect the homes and businesses and the streets in which they live and work. This is an imperative. It is not, of course, possible now, after the events, for the courts to protect the neighbourhoods which were ravaged in the riots or the people who were injured or suffered damage. Nevertheless, the imposition of severe sentences, intended to provide both punishment and deterrence, must follow. It is very simple. Those who deliberately participate in disturbances of this magnitude, causing injury and damage and fear to even the most stout-hearted of citizens, and who individually commit further crimes during the course of the riots are committing aggravated crimes. They must be punished accordingly, and the sentences should be designed to deter others from similar criminal activity.

The international cases referring to community statements demonstrate a tendency toward their use as indicia of harm to the community. The trend internationally is to accept and consider a community statement

where tendered as an indication of relevant harm that assists the court in its duty to construe harm objectively. Where a statement supplies particulars of the impact of crime on local communities or neighbourhoods, and where the court is otherwise unfamiliar with these impacts, courts may draw more significantly from the content of the statement.

Denunciation and Deterrence (and Retribution)

The use of VIS and CIS as a means of informing courts as to the general harms occasioned by a criminal offence reflects the increased standing of victims in the sentencing process. Courts are increasingly using VIS and CIS as evidence of general harm to victims and the community in order to determine the extent to which general and specific deterrence and denunciation ought to inform the determination of offence seriousness and the formulation of a proportionate sentence. To this end, such statements may also inform retribution, or the requirement that courts hand down a sentence that punishes the accused for wrongdoing. The use of such statements as a reflection of general harm stands apart from specific harm, which is direct harm occasioned to the victims themselves. While specific harms need to be foreseen by the offender at the time of the offence, general harm is not constrained by such requirements. This is because general harm is informed by a reflection upon the seriousness of the offence and offender. General harm must be construed objectively, informed by perspectives known to and accepted by the community at large. It is not populist opinion. In construing such general harm, courts are required to take account of community perspectives and sentiment as regards the nature of the offence, the culpability of the offender, and the threat the offence has occasioned to the community, or sections of the community.

While VIS may be used as evidence of specific harm, for sex offences sentencing proceedings, where the ongoing trauma to the victim may otherwise not be in evidence, courts are more likely to use such evidence as a general reflection of criminality than as evidence which specifically aggravates sentence (requiring proof at the requisite level, beyond reasonable doubt). Where offences are at a particular level of seriousness, such

as serious interpersonal violence, homicide, drug supply and trafficking, or sometimes 'hidden' offending reprehensive to community standards, including sex offending or family or domestic violence, courts may be required to shift the focus in sentencing toward such general harms. This shift toward general harm is supported by the doctrine of proportionality in sentencing law, the requirement that competing needs be balanced against the particular requirements of a case in order to overcome arbitrary punishment. Proportionality, broadly determinative of sentencing law and practice across most common law jurisdictions, necessitates a shift toward principles responsive to evidence of general harm where the characteristics of an offence and offender demonstrate particularly serious consequences to the community.[15]

Proportionality requires that the greater the harm to the community, the greater the need to consider those rationales of sentencing that phrase the offending in the context of general harms. These include denunciation and deterrence, but may also include, perhaps to a lesser extent albeit still relevant to the exercise of proportionate sentencing, retribution, rehabilitation, incapacitation, and restoration.[16] While denunciation is recognised as the need to set an example that the law should not be flouted, and thus always operates at the level of discouraging like offending by setting an example, deterrence is invariably more complicated because it addresses two connected forms of deterrence, specific and general.[17] While specific deterrence refers to the need to deter the offender from occasioning like offending, general deterrence operates on the community by providing a case example of conviction and punishment of offending. A court will tend toward specific deterrence where the offender exhibits a likelihood toward recidivist behaviour. This may be required, depending on the offender, their antecedents, and prospects of rehabilitation.

However, where an offence is of particular concern to the community, out of prevalence or significance of impact or both, a court will tend toward general deterrence and denunciation as especially relevant to sentence. It is these latter rationales that may draw from evidence presented in a community impact statement, given the representative nature of the material presented as constituting the community's reaction to the offence and offender, and the general harm that such offending causes to the community or community sector thereof. Retribution and incapacitation, as

necessitating a punitive response as expected by the community together with an anticipation that dangerous offenders be removed from the community altogether, at least for a set period of time, may also be informed by community statement. Rehabilitation and restoration, or the need to consider the causes and consequences of particular types of offending that may then facilitate a particular sentencing option that limits the likelihood of recidivism by bringing the offender back to community standards and expectations, may also draw from community impact evidence. Although several rationales of sentencing may be informed by community impact evidence, the exact rationales raised by such evidence will be determined by the offence, offender, and specific evidence of community impact as adduced. Like victim statements, community statements should not recommend particular sentencing options or outcomes, unless provided by statute. Those rationales that reflect upon community sentiment toward or reaction to particular offences will, as a general rule, be more squarely raised by community impact evidence than those that require examination of the subjective capacities of the offender, or particularities of an offence, as a specific or isolated incident of criminality.

This background of the theory and practice of sentencing is brought into context by cases using community impact evidence as representative of the harm done to the community. These cases demonstrate that courts have grappled with such evidence even where the offence and offender demonstrate characteristics that are of particular concern to the community at large. The extent to which a sentencing court may refer to and be informed by a community impact statement, however, varies largely in accordance with the terms of its tenure before the court. The use of such statements in South Australia, for instance, is limited to those instances where the Commissioner of Victims' Rights furnishes a statement before a court, in his discretion. The criminal courts of England and Wales may use such statements more liberally, by relying on the power to adduce victim or witness statement before a court. Canada has now moved away from restricting community statements to fraud matters. Increasingly, precedent guides how community statements may be used in sentencing in these jurisdictions by guiding sentencing courts as to the relevant circumstances that may warrant use of such evidence.

Restoration and Therapeutic Intervention

Chapter 4 discussed the rise of restorative intervention as a means of including the victim in the trial process. This section seeks to draw from that chapter by indicating how deferral of sentence for restorative intervention may impact on the sentencing process. This section covers the statutory framework that now inserts the outcome of an intervention orders into the determination of a proportionate sentence. To this end, the victim as a participant of a restorative intervention is now brought into the sentencing process in a new way, in addition to the ways traced in the above sections.

In NSW, after the court finds an accused guilty but before it sentences the accused, the court may order that the sentence be deferred for 12 months in order to allow a number of assessments to be made regarding the offender's prospects for rehabilitation, which may include participation in an intervention program pursuant to *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11:

> s 11 Deferral of sentencing for rehabilitation, participation in an intervention program or other purposes
>
> (1) A court that finds a person guilty of an offence (whether or not it proceeds to conviction) may make an order adjourning proceedings against the offender to a specified date:
>
> (a) for the purpose of assessing the offender's capacity and prospects for rehabilitation, or
> (b) for the purpose of allowing the offender to demonstrate that rehabilitation has taken place, or
> (b1) for the purpose of assessing the offender's capacity and prospects for participation in an intervention program, or
> (b2) for the purpose of allowing the offender to participate in an intervention program, or
> (c) for any other purpose the court considers appropriate in the circumstances.
>
> (1A) Proceedings must not be adjourned under this section unless bail for the offence is or has been granted or dispensed with under the Bail Act 2013.

(2) The maximum period for which proceedings may be adjourned under this section is 12 months from the date of the finding of guilt.

(2A) An order referred to in subsection (1) (b2) may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.

(3) This section does not limit any power that a court has, apart from this section, to adjourn proceedings or to grant bail in relation to any period of adjournment.

(4) Subsection (1) (b1) and (b2) do not limit the kinds of purposes for which an order may be made under subsection (1), so that an order may be made under that subsection for the purpose of allowing an offender to participate in a program for treatment or rehabilitation that is not an intervention program, or to be assessed for participation in such a program.

The s 11 referral for assessment for intervention follows the common law process outlined in *Griffiths v The Queen* (1977) 137 CLR 293, that allowed for the remand of the offender for the purpose of further assessment, usually to determine prospects for rehabilitation. The '*Griffiths* remand', as it came to be known, was replaced by s 11, which subsequently expanded the nature of the remand to a deferral of sentence for the purpose of assessing the offenders capacity to participate in an intervention program, and then to allow for that participation.

The issue for the court during sentencing proceedings will be whether deferral of sentence for participation in an intervention program will be available should the offender be likely to be sentenced to full-time imprisonment, even if the program is successfully completed. Where the court will be compelled to sentence an offender to full-time custody despite completion of an intervention program, offenders may still be encouraged to participate because such participation may evidence positive progress toward rehabilitation. As confirmed in *R v Brown* (2009) 193 A Crim R 574, this may impact on the final sentence to be determined, including eligibility for early release. Such participation may therefore warrant departure from a standard non-parole period. This point was further affirmed in *R v Farrell* (2014) NSWCCA 30 (also see *R v Farrell*

(2015) NSWCCA 68 regarding dismissal of Crown appeal against inadequacy of sentence), where the court observed at par [52]:

> I referred earlier to what was said by Howie J. in *Palu* about the need for there to be some assessment of the objective gravity of the offence before consideration can properly be given to making an order under s 11. I have referred to the judge having commented that the offence was 'a serious one'. But it does not appear that he had formed any concluded view of just how serious it was. In saying that the respondent should not have any 'raised expectations of what may be the final sentence', his Honour immediately added:
>
> 'That will be a sentence determined by me in accordance with *an assessment of the offence which is a serious one* and all the other factors that will be taken into account including what you do in the meantime.' (original emphasis)

The expectation that an accused who is granted an opportunity to participate in an intervention program will be able to utilise that opportunity to avoid a full-time custodial sentence must be weighed against the objective seriousness and gravity of the offending. This means that even following successful completion of a program of restorative intervention or rehabilitation, an offender may nonetheless be exposed to a term of imprisonment. *R v MRN* (2006) NSWCCA 155 supports the position that despite the availability of an intervention while on bail, the offender should still expect a substantial period of imprisonment.

However, a s 11 deferral of sentence is still made on the basis of allowing the offender to participate in a course of rehabilitation that may include a restorative intervention. In *R v Trindall* (2002) 133 A Crim R 119, for example, Smart AJ indicates that the s 11 deferral may be used to furnish the court with further and better particulars of the offender's rehabilitation or capacity for rehabilitation at pars [60–61]:

> Often a Court experiences difficulty when sentencing an offender in determining the offender's prospects of rehabilitation and whether the foreshadowed rehabilitation will occur. In many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way. That was

> the present case. It is so much better for the court to have evidence of what has actually taken place than to have to base its decision on the opinions of experts, assertions by the offender and what has happened over a short period of time, that is, since the commission of the offence or the offender's arrest.

The Crown appeal in *R v Otchere* (2007) NSWCCA 367 provides a case in point as to the use of a s 11 deferral involving restorative intervention that includes an apology to the victim. In this case, the offender committed two robberies in company with violence. The Crown sought to appeal against sentence on the basis that the sentence of 3 years and 8 months imprisonment with a non-parole period of 1 year and 5 months was manifestly inadequate. The NSWCCA dismissed the appeal on the basis of the strong, exceptional, and unique subjective case of the respondent, which included progress toward rehabilitation as acknowledged by the court. In dismissing the appeal, the court cites the progress made toward recovery by enrolment in a pre-sentence restoration program and the apology to the victim at pars [18–20]:

> A statement of support was received from the Community Restorative Centre (CRC), a New South Wales community organisation supporting people involved in the criminal justice system, particularly offenders, ex-offenders, and their families. One of the programmes operated by the Centre is the StAMP mentoring programme, which recruits mentors to assist ex-prisoners in their transition back to community life. The programme is supported by the New South Wales government and a number of municipal councils. The respondent was referred to the StAMP programme on 31 October 2006 when he requested a mentor to help him in facing the difficulties he experienced in relation to his pending prosecution. He presented as honest and open about the offence and 'clearly expressed that he wanted to take responsibility for what he had done'. He sought help to pursue counselling especially to help him to deal with his alcohol and cannabis use. The respondent met the mentor assigned to him weekly and responded very positively to his advice and help. He has undertaken consistent and regular contact and had shown a commitment to full participation in the programme. The co-ordinator of the programme said that she was struck by the respondent's 'honesty and his willingness to be challenged whenever he attempted to minimise or justify his actions by stating that he was intoxicated at the time'.

> The co-ordinator has said that the respondent has accepted that he is responsible for his actions and had shown repentance and expressed remorse for what he did both to the co-ordinator and his mentor. A report by Ms Jakobsen, a qualified social worker, working with a small group of socially isolated African youth on a voluntary basis, met the respondent, who is an associate of some members of that group, in October 2006. She described him as having 'a very troubled conscience, seeking advice and counselling'. It was this worker who referred the respondent to the Community Restorative Centre. She remained in contact with the respondent since that time. In substance, she believed that the respondent knew that what he had done was very wrong, concluded that he must tell the truth about it as best he knew it and accepted that he must face the consequences of his actions. Ms Jakobsen also believed that the respondent had recognised that it was necessary that he must change his way of living and needed help to do so.
>
> The sentencing judge accepted, it seems to me, the essential reliability of the history disclosed in this material. In my view, although the respondent did not give evidence, the judge was entitled to do so. The respondent had also written a letter, which the sentencing judge accepted as genuine, to the victims of the offence in which he expressed his contrition and remorse. Her Honour considered, and was entitled to so conclude, that the respondent was unlikely to re-offend and had good prospects for rehabilitation. She concluded that the offence was "an isolated occurrence".

Other cases abound with references to restorative intervention as a relevant subjective characteristic of the offender's rehabilitation. Many of these instances include some contact with the victim,[18] whether by letter or in person, and the court will generally cite favourably any contact with the victim that leads the offender to realise the harms they have occasioned and the trauma that they have caused. Chap. 6 covers punishment and refers to further restorative intervention as part of a prisoner's sentence.

Victim Rights and the Sentencing Process

The sentencing process was one of the first avenues for the return of the victim following their removal from the criminal trial process into the early part of the twentieth century. In the 1980s and 1990s, victims

were granted opportunities for participation via the delivery of a VIS that increasingly became legislated across various jurisdictions as a formal mode of victim participation in the criminal justice system. While courts were required to consider harm to the victim and have long considered this in the sentencing process, VIS represented a watershed moment where victims gained rights of substantive participation that enabled them access to a therapeutic process that stood the chance of making a substantive impact on the sentence to be determined. Since the 1990s courts have therefore grappled with the way in which VIS are to be taken into account in sentencing, with all jurisdictions now recognising them as a form of evidence that may be factored into sentencing where relevant (Doak et al. 2009).

The sentencing phase has always been a controversial one in that it is one of the phases of the criminal trial that gains substantial public exposure. As such, there is a willingness for statutory intervention to fetter judicial discretion away from an intuitive synthesis of the issues toward a more structured process that includes reference to the harms and injuries consequent upon offending. A more structured or formulaic approach to sentencing followed, where judges are required to sentence offenders to minimum mandatory or fixed terms for certain offences, or follow a calculus for the determination of the non-parole period before which an offender cannot be released from prison on licence. The controversial reform of sentencing law and process to protect victims and to respond to community concerns over the gravity of crime and the sentences that follow also increasingly characterise the intersection between victims and sentencing. Although the reforms to set minimum terms have yet to be proven to benefit victims, specific reference to harm occasioned to victims and the threat to the enjoyment of the peace has been central to the development of the extension of sentencing and to corral the discretion to the courts. Although identified as political interference with an independent process, the spontaneous reform of sentencing law is often cited in the interests of victim even where this occurs out of neglect of victim interests over a longer period.

Sentencing has continued to be a dynamic phase of the criminal trial where the rigidities of criminal procedure may be dispensed with for an examination of evidence that goes toward offence seriousness and offender culpability in order to determine the gravity of the offending and to set a proportionate penalty. This has opened up the capacity to

move beyond traditional criminal trial processes for a consideration of new ways of introducing evidence into proceedings. This includes the use of deferrals to allow the offender to enrol in an intervention program that includes the victim. Although these programs take different forms depending largely on the degree to which there is an identifiable victim, the willingness of the victim to participate, offender's need for treatment, and their custodial status, courts are increasingly aware of the benefit of a deferral of sentence for the purpose of further evaluating the offender's rehabilitation or prospects of further rehabilitation. The intervention program is therefore increasingly cemented into the sentencing process, particularly in the lower courts where pre-sentencing intervention is common.

The focus on the community and the need to deter and denounce crime is a central concern of the courts in the sentencing process. Parliament has been willing to extend the evidence available to the courts in this regard by introducing CIS as a means of supplementing the information on the impact of the offence on the community before the sentencing court. Although identified as a non-traditional source of evidence and information upon which sentencing determinations may be made, CIS may assist the court by placing an offence in a particular community context. This context may not otherwise be known to counsel or be in evidence. As such, as a discretionary instrument before the court, CIS may assist the court to arrive at a decision to focus on specific or general deterrence, or to denounce the conduct of the offender, given the prevalence of the type of offending commissioned by the accused. Domestic violence offending is identified as one example of a class of offending that remains 'hidden' from the courts and for which a CIS may assist the court in its phrasing of the offences changed.

Notes

1. See *Lee v State Parole Authority of New South Wales* (2006) NSWSC 1225.
2. See s 124 of the *Criminal Justice Act 2003* (UK). Also see Ashworth and Roberts (2012: 870–871). As to the continuing relevance of the common law against s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), see *Muldrock v The Queen* (2011) HCA 39, [20]: 'The purposes there stated (in s 3A) are the familiar, overlapping and, at times, conflicting, purposes

of criminal punishment under the common law (see *Veen v The Queen (No. 2)* at 476–477). There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No. 2)* in applying them'. Also see *R. v Dodd* (1991) 57 A Crim R 349 at 354: 'there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place'.

3. Where a sentence is determinative, such as a mandatory life sentence for murder, the court will apply this method to the determination of the non-parole period, which sets the minimum period of imprisonment within which a prisoner will not be able to be released on licence.
4. Although based on acts that are likely to require a specific intent, this does not preclude liability for consequences where other harms are occasioned that are not anticipated at the time of the commissioning of the offence.
5. See *R v Loveridge* (2014) NSWCCA 120. On appeal, the original sentences were found to be manifestly inadequate, the Crown submitting that: '(a) Ground 1—his Honour erred by failing to take into account the additional need for general deterrence due to the prevalence of alcohol-fuelled offences of violence; (b) Ground 2—his Honour erred by failing to take into account the need for specific deterrence of the Respondent; (c) Ground 3—his Honour erred by double counting subjective features when making a finding of special circumstances; (d) Ground 4—his Honour erred in failing to take into account material considerations in relation to intent and risk; (e) Ground 5—his Honour erred in classifying each offence as spontaneous; (f) Ground 6—his Honour failed to accumulate the sentences sufficiently; and (g) Ground 7—the sentences, individually and in total, are manifestly inadequate'. The original accumulated sentence of 5 years and 2 months was quashed for a new accumulated head sentence of 13 years and 8 months. Note that the sentence was an accumulation of sentences for three counts of common assault, one count of assault occasioning actual bodily harm, and one count of manslaughter. The original sentence passed on Loveridge for the killing of Thomas Kelly was 6 years with a non-parole period of 4 years. This was increased by the NSWCCA to a total head sentence of 10 years and 3 months, with a non-parole period of 7 years. Also see *Attorney General's*

Reference No. 60 of 2009 (Appleby and Ors) [2010] 2 Cr App R(S) 46*; Reference by the Attorney General Under Section 36 Criminal Justice Act 1988* [2005] EWCA Crim 812.

6. See the discussion in Chap. 1 of the criticisms of the breadth of such reforms and how it arguably results from the exclusion of victims from criminal justice processes.
7. *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW). As of March 2015 no family impact statements have been explicitly referred to as representing harm to the community.
8. While the VIS process could be subject to enforcement, most courts would allow victims (or the prosecution) to present their statement. It was only when courts began to utilise VIS as a source of evidence that victims gained a capacity to influence sentence. This gave rise to the VIS as a substantive right, whereby victim input could potentially influence the decision being made.
9. The draft NSW legislation sought to have a community impact statement tendered by the Commissioner of Victims' Rights, NSW. See *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements—Mandatory Consideration) Bill 2014* (NSW). This Bill was defeated in the NSW Legislative Assembly. Also see note 13.
10. In England and Wales the police will draft a community impact statement. Such statements will then accompany the case file to be used by courts and, where relevant, may be used by police to set policing practices as appropriate to the impact statement. Such statements may even inform police and prosecuting practice concerning charging and plea-deals by raising the prosecutor's awareness of the prevalence and urgency of the offence under consideration.
11. See Chap. 8 as to extra-curial rights and the rise of the office of Commissioner of Victim Rights.
12. *Criminal Law (Sentencing) Act 1988* (SA) s 7B.
13. *Criminal Justice Act 1967* (UK) s 9; *Criminal Procedure Rules 2010* (UK) pt 27.
14. See *Criminal Code*, RSC 1985, C-46 (Canada) s 380.4(1) (repealed).
15. *R v Dodd* (1991) 57 A Crim R 349.
16. See generally, Australian Law Reform Commission (2006) *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC Report No. 103, 133–140.

17. See *R v Innes* (2008) ABCA 129, [10]: 'Specific deterrence refers to convincing this accused not to reoffend. It is often little needed by the time of sentencing. General deterrence refers to inducing others tempted to commit this offence not to do so. It is especially important with crimes involving premeditation or planning and persistence, and with crimes that are fairly common. Denunciation refers, in part, to convincing all the public that the offence in question is a true crime, a serious crime, one which respectable people would shun, and not obsolete, technical, or minor. It also reassures the law-abiding, and informs everyone that the relationship between crime and punishment is considered logical, and just.'
18. See *R v Dixon; R v Pearce; R v Pearce* (2009) NSWCCA 179; *R v Huang* (2006) NSWCCA 173; cf. *Thorpe v R* (2010) NSWCCA 261.

6

Appeals, Punishment and Parole

Post-Sentencing Processes and the Victim

After the sentencing hearing, victims are generally excluded from any further participation in the remainder of the criminal trial process. With perhaps the exception of the parole hearing, where the victim may be invited to attend to submit a VIS, victims have been afforded few rights once the prisoner is handed over to the state for punishment. The appeals process contains few powers that could be characterised as service, participatory, or enforceable level rights. Rather, the state takes over and excludes victim participation during appeals against conviction or sentence, during the prisoner's term of sentence, whether custodial or non-custodial, and during the parole application and determination process.

This chapter examines the rise of victim rights in the criminal appeals process; the rise of registers for victims who wish to be kept informed of the status of the offender; the rise of mediation and restorative intervention in prison; the emerging trend to continuously assess the risk of highly recidivist offender groups potentially subjecting such offenders to extended, preventative detention beyond their head sentence (for instance, sex offenders, recidivist violent offenders); and the capacity

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of the victim to participate in parole hearings and contribute to the substantive basis of parole decisions.

There is an increased emphasis on the provision of rights for victims following sentencing out of recognition that victim interests continue to play out throughout the appeal and corrections process. While the state continues to dominate this phase of the criminal trial, victim interests are being recognised through a limited number of enforceable and participatory rights. There is larger scope regarding service level rights, where victims are being invited to observe appeals, to meet with the prosecutor, and to be kept informed as to key processes and decisions made leading up to and during the appeal. The availability of registers to be kept informed of decisions regarding the custodial status of the offender, including escape, and pending parole hearings, further allows for participatory and service rights. The use of preventative detention, a controversial move to extend a prisoner's detention beyond their head sentence, has also been justified out of the need to protect the victim and the community from recidivist offenders. The parole hearing, however, provides the victim with greater scope for direct participation. This grants the victim a basis through which to make submissions that may be relevant to a parole determination. Where parole is determined on the papers, the victim may still submit a written statement to the Parole Board.

Victims and the Criminal Appeal Process

Victims have tended to be excluded from the criminal appeal process. This includes decisions to appeal a manifestly inadequate sentence by the Crown or in formulating the Crown's response to the defendant's appeal. The right to appeal resides in the prosecution or defence alone, as provided by statute. In adversarial systems, the victim is not granted party status, nor are they able to submit new evidence or make submissions to the prosecution in aid of a prosecution appeal. Increasingly, this vacuum is being realised, and victims have been increasingly afforded the right to information and consultation regarding appeal decision-making processes. While victims may not summit a VIS afresh during appeal proceedings, with perhaps the exception of England and Wales where

the Victim Personal Statement (VPS) accompanies the case file, although statements generally cannot be updated post-sentence, recent debate has centred upon whether this should be extended to criminal appeals as a matter of process. The vehicle through which victims are being granted rights in the appeal process varies by jurisdiction but generally involves legal guidance, amendment of the charter of rights applicable to victims, or by discrete powers inserted into criminal procedure legislation or the enabling statute constituting the powers and rights of parties before the Courts of Criminal Appeal.

Despite the victim's general lack of standing in criminal appeals there are, however, few powers exercisable by victims themselves, which come to bear on the appeal process. The jurisdictions that contain enforceable rights that bear on the appeal process include the victim's right to request that the prosecutor appeal in South Australia; the victim's right to appeal an unfavourable outcome regarding the defence's access to confidential counselling communications in the pre-trial process in New South Wales; and the capacity to appeal a decision of the trial court to allow the accused to cross-examine a victim on their sexual history and reputation in the USA pursuant to *Doe v United States* (1981) 666 F 2d 43.

Criminal Appeals: Substantive Rights

Section 10A of the *Victims of Crime Act 2001* (SA) allows the victim, or their representative, to request that the prosecution considers an appeal against an outcome in a criminal proceeding. Attorney-General Atkinson indicates in his second reading speech that s 10A does not displace the Crown's discretion to make a decision in the public interest. However, it is clear from the legislation and its introduction into the Parliament of South Australia, that s 10A provides the victim with consultative powers that extend beyond the requirement to keep the victim informed of outcomes:

> [V]ictims of crime will have the right to ask the prosecuting authority to consider an appeal. Some victims feel very strongly that the sentence imposed on the offender was inadequate or that the decision to acquit was

> wrong. Victims often feel that these decisions should be appealed. At the very least, they feel that the prosecutor could consider an appeal. The Bill therefore provides victims of crime with the right to ask the Director of Public Prosecutions to consider a prosecution appeal. The final decision about whether or not to institute an appeal will, however, continue to rest with the Director of Public Prosecutions. (Attorney-General Atkinson, *Hansard*, Legislative Assembly of SA, 24 July 2007, 609–610)

In NSW, victims may exercise rights of appeal regarding unfavourable outcomes of the pre-trial process granting the defence access to otherwise confidential communications between victim and counsellor, or other health care provider offering such services, in sex offences cases. The *Criminal Appeal Act 1912* (NSW) provides that an appeal may be brought to challenge a decision adverse to the victim where the trial judge grants the defence's request to access a protected confidence or where the trial judge makes the determination that a document or other evidence does not contain a protected confidence. Section 5F(3AA)-(3AB) provides:

> (3AA) A person who is not a party to proceedings to which this section applies may appeal to the Court of Criminal Appeal against a decision in those proceedings to grant leave under Division 2 of Part 5 of Chapter 6 of the Criminal Procedure Act 1986 or a determination in those proceedings that a document or evidence does not contain a protected confidence within the meaning of that Division, if the person is:
>
> (a) a person who, because of the leave, is required to produce a document or adduce evidence that contains a protected confidence, or
> (b) a protected confider in relation to a protected confidence that may be produced or adduced because of the leave, or
> (c) a person who claims the document or evidence does, despite the determination, contain a protected confidence in relation to which the person is a protected confider.
>
> (3AB) An appeal under subsection (3AA) may be made whether or not an appeal has been made by a party to the proceedings, but only if:
>
> (a) the Court of Criminal Appeal gives leave to appeal, or
> (b) the judge or magistrate of the court of trial certifies that the decision is a proper one for determination on appeal.

Several cases demonstrate how this appeal mechanism may be exercised by victims or other interveners, including medical practitioners seeking to protect the confidentiality of communications for their client. *KS v Veitch* (2012) NSWCCA 186, *KS v Veitch (No. 2)* (2012) NSWCCA 266 and *PPC v Williams* (2013) NSWCCA 286 demonstrate that victims have been willing to challenge decisions to allow the defence access to counselling communications and the NSWCCA has been willing to uphold such rights on appeal. The NSWCCA ruled in *ER v Khan* (2015) NSWCCA 230 that documents sought may be classified as a protected counselling communication and that the courts ought to exercise caution when determining that the documents in question were not protected confidences, at par [116]:

> The ruling made in relation to these documents was that they were not protected by sexual assault communication privilege. His Honour's reasons record, inter alia: 'There is no counselling involved that I could ascertain'. That statement is accurate as to the communication as between the parties to the Contact Record (Colin Foster and Ms Fidis). However Ms Fidis, counsellor, is identified as the source of the information in the Contact Report and that information is identified as being derived from 'a counselling session'. In these circumstances I am of the opinion that the claim for privilege in relation to the document at pages 74–77 should be included in the documents his Honour reserved for further consideration (see para (3) in [110] above), and that the ruling made by his Honour in relation to them be reviewed in light of the above comments. I note that this Court has not had the benefit of seeing the documents. I acknowledge the possibility that there may be some material in them that supports his Honour's determination.

The victim's right to appeal against adverse decisions to release otherwise confidential counselling communications to the defence in sex offences proceedings is sparingly exercised. However, it was introduced into NSW law as an important complement to protect the rights of sex offences victims and to further inculcate the sexual assault communication privilege as a foundational right of the victim to be protected during sex offences proceedings.

In the USA, victims may exercise their right to protection from cross-examination on the basis of sexual reputation or history under the

Federal Rules of Evidence 28 USC art. IV § 412. The case of *Doe v United States* (1981) 666 F 2d 43 concerned an application to the Fourth Circuit Court of Appeals regarding the decision of the District Court that the evidence concerning the past sexual behaviour of the victim was admissible in the rape trial of Donald Robert Black. The court deals with the victim's right to appeal an interlocutory decision of the trial court before proceedings to rule on the admissibility of the evidence requested by the defendant at par [10]:

> … the injustice to rape victims in delaying an appeal until after the conclusion of the criminal trial is manifest. Without the right to immediate appeal, victims aggrieved by the court's order will have no opportunity to protect their privacy from invasions forbidden by the rule. Appeal following the defendant's acquittal or conviction is no remedy, for the harm that the rule seeks to prevent already will have occurred. Consequently, we conclude that with respect to the victim the district court's order meets Gillespie's test of practical finality, and we have jurisdiction to hear this appeal.

The defendant made a pre-trial motion to seek the production of evidence and enable cross-examination of the victim regarding the victim's prior sexual history and behaviour. The trial court ruled that the defendant was able to call witnesses and introduce evidence of the victim's sexual history. Subpoenas were then issued calling several persons to testify at trial. The individuals called included the victim's former landlord, a social worker familiar with the victim, and one of the victim's prior sexual partners. The defendant further subpoenaed another two individuals whom he asserted were familiar with the victim's prior sexual activities and promiscuity. The Fourth Circuit Court of Appeals ruled at par [27]:

> The legislative history discloses that reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victim's consent or her veracity. Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Committee on the Judiciary, 94th Cong., 2d Sess. 14–15, 45 (1976). There is no indication, however, that this evidence was intended to be excluded when offered solely to show the accused's state of mind. Therefore, its admission is governed by the Rules of Evidence dealing with relevancy in general.

The appeal in the case of *In re: One Female Juvenile Victim and United States of America v Stamper* (1992) 959 F 2d 231, further demonstrates the victim's right to appeal under the Federal Rules of Evidence where the accused seeks to introduce evidence of prior complaints of sexual assault and rape.

Criminal Appeals: Participatory Rights

Some discussion has emerged regarding the capacity for victims to submit a new or updated VIS during the appeal process. This issue has arisen again where the accused is required to be re-sentenced following the quashing of their original sentence by a court of appeal. There is scant support for the updating of a VIS for the appeal court out of recognition that most appeals regard matters of law and not fact (Department of Justice Victoria 2014). Whether this lack of support ought to be generally supported by law and policy is another question, given that a victim who chooses to make a new or updated statement may be warned that it may never be referred to unless the court of appeal considers matters that relate to the original sentence of the accused, where issues raised in the VIS are potentially relevant.

Despite little international support for victim participation in the appeal phase, the practice of taking a VPS in England and Wales and placing it on the case file means that it is possible to make a new or updated statement during the appeals process. Clauses 5.6 and 5.7 of the Victims' Code, Chapter 2, Adult Victims, Part A: Victims' Entitlements, provide:

> 5.6 In determining an appeal against sentence, the court will always take into account any Victim Personal Statement (VPS) that is presented to it which was provided to the sentencing court.
>
> 5.7 It is not normally necessary for a further VPS to be provided to the Court of Appeal. However, if there is information the court should know about the continuing impact the crime has had on you, a new or further VPS may be sent to the court through the police or CPS. In very rare cases, you may be asked questions about your VPS in court. If the VPS is used in evidence, it will be disclosed to the defence and should not contain any comments about the sentence given or whether the appeal should succeed or not.

The Department of Justice (2014) in Victoria recommends against the introduction of VIS following sentencing on the basis that it may raise expectations that a new, post-sentencing submission, will influence the decision of the Court of Appeal. However, such expectations may need to be managed should the English approach be adopted. Although not all offences will call for an updated VIS on appeal, certain offences or classes of offences, such as sex offences, where the harm and trauma may increase over time, may warrant the tenure of VIS post-sentence. This may need to be limited to appropriate cases, with the leave of the court, where such explanation may be given that informs victims that the statement may not need to be used in determining the appeal.

Criminal Appeals: Service Rights

Victims are increasingly entitled to service level rights during the appeals process. These rights may be supplied generally across all phases of the criminal trial via a charter or declaration of rights and may include the right to be kept informed of a decision or outcome regarding their case, including a change in the prisoner's custodial status. However, increasingly, such rights are declared in terms of the criminal appeal process. This highlights that victims continue to be interested in and affected by the outcomes of the criminal appeal process and that other rights as declared may not extend, or be seen to extend, to the appeals process. Service rights in the appeal process are contained under the Victims' Code.

The Victims' Code prescribes that victims are to be granted certain rights during the appeals process. These rights are most appropriately described as service level rights, as they do not require actual court participation nor are they enforceable against the state. In England and Wales, where an application is made to appeal against a decision made in a Magistrates' Court to the Crown Court, clause 5.2 of Chapter 2, Adult Victims, Part A: Victims' Entitlements, provides that the Witness Care Unit must notify the victim of several things, specifically, the date, time, and location of any hearings, and the outcome of the appeal, including any changes to the original sentence. Relevant contacts must also be

given, and appropriate seating must be chosen for the victim should they attend court. Clauses 5.2 and 5.3 of the Victims' Code, Chapter 2, Adult Victims, Part A: Victims' Entitlements, provide:

> 5.2 You are entitled to be informed of the following information by your Witness Care Unit within 1 working day of them receiving it from the court: any notice of appeal that has been made; the date, time and location of any hearing; the outcome of that appeal, including any changes to the original sentence.
>
> 5.3 You are also entitled to: wait and be seated in court in an area separate from the appellant and their family and friends. The court will ensure this is done wherever possible; be provided with a contact point at the Crown Court; receive information about victims' services where appropriate and available.

Where a matter proceeds before the Court of Appeal (Criminal Division) or Supreme Court of the UK, the CPS must identify the Witness Care Unit within the Criminal Appeal Office, and:

> 5.4 You are entitled to: be told that the appellant has been given leave to appeal within 5 working days of the Witness Care Unit receiving that information from the court. If you are a victim of the most serious crime, persistently targeted or vulnerable or intimidated you are entitled to receive this information within 1 working day; receive information about the date, time and location of any hearing from the Witness Care Unit within 1 working day of them receiving the information from the court; be told by the Witness Care Unit if the appellant is to be released on bail preappeal or if the bail conditions have varied within 1 working day of them receiving this information from the court; receive an update from the Witness Care Unit on any changes to hearing dates within 1 working day of receiving this information from the court; be provided, by your Witness Care Unit, with a contact point for the Criminal Appeal Office or UK Supreme Court staff; be told about the result of the appeal within 5 working days of the Witness Care Unit receiving that information from the court. This includes any changes to the original sentence. If you are a victim of the most serious crime, persistently targeted or vulnerable or intimidated you are entitled to receive this information within 1 working day; wait and be seated in court in an area separate from the appellant and their family and friends. The court staff will ensure this is

> done wherever possible. It is rare for the appellant to attend hearings in the Supreme Court. Special arrangements will be made for you if the appellant is present and you do not wish to sit in the courtroom; request a copy from the Criminal Appeal Office or UK Supreme Court staff of the court's judgment in the case once it has been published.

Particular policies regarding the appeals process also apply to family members in homicide cases. Under CPS policy, the care and treatment of victims and witnesses is prescribed by the Victims' Code. This specifies that the CPS may meet with family members where a matter proceeds before the Court of Appeal (Criminal Division). Family members will be able to meet with the prosecutor to discuss the issues under appeal and how this may impact on the original conviction or sentence. The Victims' Code requires that the CPS refer family members to the Witness Care Unit for the Criminal Appeal Office. If family members attend the Court of Appeal (Criminal Division) hearing, they will be accompanied by a CPS officer who is able to answer questions that arise during proceedings. Clause 5.5 of the Victims' Code, Chapter 2, Adult Victims, Part A: Victims' Entitlements, provides:

> 5.5 Following grant of leave to appeal, if you are a bereaved close relative, in a qualifying case, you are entitled to be offered a meeting with the CPS to explain the nature of the appeal and the court processes.

As noted in Chap. 1, the Victims' Code is divided into two main sections for adult victims. This includes clauses relating to (i.) victims' entitlements and (ii.) duties on service providers. There are corollary duties prescribed to service providers under the Victims' Code, Chapter 2, Adult Victims, Part B: Duties on Service Providers.

Registers of Victim Interests and Access to Information

The removal of the victim post-sentencing has resulted in most victims being ill informed of developments regarding their case. This also includes developments related to the offender, regarding their place of

confinement, entitlements to day or work release, eligibility for parole hearings, or escape. This lack has been identified as a major source of grief for some victims, who may continue to be fearful of any contact with the offender, and who may have gone to lengths to change their life following the offence, to avoid any possible contact with them. Alternatively, some victims wish to be kept informed as a mark of respect, to signify the fact that they continue to hold an interest in the matter and that they ought to be kept informed of events as a stakeholder vested with rights.

Victim registers inevitably connect to the parole system in most jurisdictions given that victims often desire some degree of input into the administration around the granting of an offender's parole licence. It is important, therefore, that the victim be kept informed as to the progress of the offender, including their custodial status, enrolment in outside work or educational programs, in order to develop a fuller appreciation of the offender's time in custody. This has the potential to benefit the offender and victim, given that any statement provided to the parole authority at the time of determinations of the granting of parole will be better informed (where possible) where the victim is able to follow the progress of the offender's rehabilitation in prison.

In NSW, victim registers are established under the *Crimes (Administration of Sentences) Act 1999* (NSW). Registers are currently kept across three separate departments, depending on the characteristics of the offenders and which department holds responsibility for them.[1] The Department of Corrective Services is the government department that holds responsibility for convicted offenders held in custody. The Mental Health Review Tribunal holds responsibility for forensic patients as provided under the *Mental Health Act 1990* (NSW). The Department of Juvenile Justice holds responsibility for juvenile offenders held in custody. The *Crimes (Administration of Sentences) Act 1999* (NSW) establishes the victims register pursuant to s 256:

> s 256 Victims Register
>
> (1) There is to be a Victims Register.
>
> (2) There are to be recorded in the Victims Register the names of victims of offenders who have requested that they be given notice of the possible parole of the offender concerned.

(3) Subject to the regulations, the Victims Register is to be kept by such government agency as the Minister directs.

(4) The regulations may make provision for or with respect to:

(a) the keeping of the Victims Register, and
(b) the manner in which a notice to victims may or must be given under this Act and the circumstances (if any) in which such a notice need not be given, and
(c) the identification of persons who are victims for the purposes of this Act, including:

(i) the determination of the persons who are family representatives of victims, and
(ii) the provision, by persons claiming to be victims, of evidence of their identity and of the circumstances by which they claim to be victims.

(4A) Members of staff of the government agency that keeps the Victims Register may assist:

(a) the Review Council and the Parole Authority to give notices to victims under sections 67 and 145, and
(b) the Parole Authority to give a victim of a serious offender or a victim's authorised agent access to documents specified by the Parole Authority for the purposes of section 193A, and
(c) the Review Council and the Parole Authority to carry out other ancillary functions relating to the matters referred to in paragraphs (a) and (b).

The *Victim Rights and Support Act 2013* (NSW) s 6 further prescribes rights through the Charter of Rights of Victims of Crime.

6.15 Information about impending release, escape or eligibility for absence from custody: A victim will, on request, be kept informed of the offender's impending release or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.

In Victoria, the victims register is prescribed under ss 30A-30I of the *Corrections Act 1986* (Vic). The legislation establishing victim rights in

this regard is detailed as to the specific information that may be provided to the victim and the sentences to which such information refers:

s 30A Victim may be given certain copies of orders and information about a prisoner

(1A) Subject to subsection (3) and section 30G, the Secretary must notify a person included on the victims register in respect of an offence for which a prisoner is serving a sentence of imprisonment of the release of the prisoner on parole.

(1B) A notification under subsection (1A) must be made at least 14 days before the release of the prisoner on parole, unless the Adult Parole Board has waived the notice period in making the parole order.

(2) Subject to section 30G, the Secretary may give a person included on the victims register in respect of an offence for which a prisoner is serving a sentence of imprisonment some or all of the following information:

(a) details about the length of the prisoner's sentence for the offence and of any other sentences of imprisonment that the prisoner is liable to serve;
(b) the date on which, and the circumstances in which, the prisoner was, is to be or is likely to be released for any reason (including release on bail, custodial community permit or parole);
(c) details of any escape by the prisoner from the legal custody of the Secretary or any other person.

(2AA) Subject to subsection (2AB) and section 30G, the Secretary may give a person included on the victims register in respect of a relevant offence for which an offender is or was subject to a supervision order or a detention order, or an application for a supervision order or a detention order, some or all of the following information in respect of the offender:

(a) the making of an application for an extended supervision order, a supervision order or a detention order and whether such an order was made, whether on appeal or otherwise;
(ba) if a supervision order or detention order is made, varied or renewed:

(i) the date on which it commences, the period of the order and any instructions or directions, or any variation of the instructions or directions, given to the offender by the Adult Parole Board under

section 119, 120(2) or 121 the Serious Sex Offenders (Detention and Supervision) Act 2009;

(ii) details of any changes affecting the operation of the order;

(iii) a copy of the order;

(c) if the supervision order or detention order is suspended or revoked, the date of suspension or revocation, and the date on which a suspended order recommences operation.

Other jurisdictions have also enacted a register of victims' interests. The *Correctional Services Act 1982* (SA) provides for the creation of a register under s 5:

s 5 Victims Register

(1) The CE (Chief Executive of the Department of Corrections) must keep a Victims Register for the purposes of this Act.

(2) The victim of an offence for which a prisoner is serving a sentence of imprisonment or, if the victim is dead or under an incapacity or in prescribed circumstances, a member of the victim's immediate family, may apply in writing to the CE to have the following information entered in the Victims Register:

(a) the applicant's name;

(ab) the applicant's contact address and (if supplied) phone number or the name, contact address and (if supplied) phone number of a person nominated by the applicant to receive information under this Act on his or her behalf;

(b) any information (including the name of the prisoner) in the applicant's possession that may assist the CE to identify the prisoner.

(3) The CE is entitled to assume the accuracy of information supplied under subsection (2) without further inquiry.

(4) The Victims Register must also contain any other information prescribed by the regulations.

(5) The CE must, when requested to do so by the Board, provide the Board with information derived from the Victims Register.

(6) If the Victims Register includes particulars of a person nominated by a registered victim to receive information under this Act on his or her behalf, any information or notification required or authorised by this Act to be given to the registered victim must, instead, be given to the person

so nominated (and where such information or notification is to be given at the request of the registered victim, the person so nominated is entitled to make such a request as if he or she were the registered victim).

The information to which the victim is entitled in Victoria is further supplemented by rights provided under the Victims' Charter pursuant to s 17 of the *Victims' Charter Act 2006* (Vic):

(1) A victim of a criminal act of violence within the meaning of section 30A of the Corrections Act 1986 may apply to be included on the victims register established under that Act.

(2) The Secretary may give to a person included on the victims register certain information concerning the offender such as the length of sentence, the likely date of release and the making of an extended supervision order, a supervision order or a detention order.

(3) If the Adult Parole Board is considering ordering the release on parole of an imprisoned offender who has committed a criminal act of violence:

(a) a person included on the victims register may make a submission to the Board about the effect of the offender's potential release on the victim; and

(b) the Board is to consider any submission received.

The right of victims to information in England and Wales is provided under the Victims' Code. Clause 6.9-6.19 of the Victims' Code, Chapter 2, Adult Victims, Part A: Victims' Entitlements, provide the Victim Contact Scheme and for Serious Further Offence reports, as well as Sex Offender Notification Requests. A range of rights are provided that allow the victim to access, through the Witness Care Unit or Youth Offending Teams, where offenders sentenced for violent or sexual offences can receive a term of 12 months or more, or be detained in hospital under the *Mental Health Act 1983* (UK). Clause 6.12 provides the following rights:

- provide information to victims about certain key stages of an offender's sentence when they have decided to participate in the VCS and wish to receive this information, and the provision of this information is considered appropriate at the discretion of the probation trust;
- find out whether the victim would like to be informed of and/or make representations about licence conditions or discharge conditions and pass their views to those responsible for making the decision;

- inform the victim about relevant licence conditions or discharge conditions which relate to the victim and their family;
- offer the services outlined above to the victim's next of kin and to other bereaved close relatives if this is considered appropriate by the probation trust;
- a vulnerable adult, or is otherwise unable to participate in the VCS unless it is not considered to be in the best interests of the victim to do so; in cases concerning Foreign National Offenders, work with the immigration authorities to ensure as far as possible that information about the prisoner's immigration status and any deportation information is passed on to victims;
- offer the services outlined above to the parent, guardian or carer of a victim who is under 18, or is a vulnerable adult, or is otherwise unable to participate in the VCS unless it is not considered to be in the best interests of the victim to do so; and
- in cases concerning Foreign National Offenders, work with the immigration authorities to ensure as far as possible that information about the prisoner's immigration status and any deportation information is passed on to victims.

The provision of information to the victim requires significant administrative resources given the number of departments that administer the offender's sentence. This is further complicated where the offender participates in intervention requiring their partial release into the community or where the offender requires mental health assessment and treatment.

Victims and Punishment: Mediation and Restoration in Prison

Chapter 3 covered alternative pathways to justice including restorative intervention associated with the pre- and post-sentencing processes. This section draws from that chapter by referring to mediation or victim-offender dialogue in prison. While pre-sentencing intervention tends to focus on offences up to mid-level seriousness, usually disposed of in the

lower courts of summary jurisdiction, mediation may be available for more serious offences. Post-conviction mediation is available for offences including murder and other homicides (see Walters 2015; Kay 2008). It is also increasingly available for sexual assault and rape, including child sexual assault. Caution must be exercised with sexual offences, given the possibility of the manipulation of the victim regarding notions of consent and the possibility for the exacerbation of harm, although there has been reported success even for these more personal offences (Miller and Iovanni 2013). Restorative justice in prison may in fact be of great benefit, given that it does not need to occur within time constraints as for court referred pre-sentencing intervention. Both victims and offenders have therefore had time to deal with more of the issues around the offence—the victim has had time to grieve and the offender time to accept responsibility and develop empathy.

While mediation and restorative intervention in prison may be relevant to an offender's eligibility for parole, it may also play a role in any re-sentencing that may follow an appeal. Thus, where victims are willing to participate in post-conviction mediation and intervention it will be of material relevance to the court where an offender appears for sentencing following the quashing of the original sentence by the court of appeal.

The case of *Flynn v R* (2010) NSWCCA 171 demonstrates the use of post-conviction mediation and its impact on the victim and offender. This case warranted a reduced sentence as substituted by the NSWCCA. Although other subjective and objective factors weighed on the mind of the court, the progress the offender had made by meeting the victim of one of his crimes provided a subjective characteristic that could be taken into account in the determination of the sentence. The court ruled at par [51]:

> During oral submissions the applicant, an obviously intelligent young man, said that he had attended a restorative justice program at Parklea Gaol where he had met the victim of his car-jacking offence and the things that he had done to her life 'absolutely blew him away'. He said as he was now 26 years old, he wanted to get his life 'together'. The applicant had written to Mr Taylor the psychologist who runs an Ex-Inmate program and his letter in response which specifies the conditions of the program is in evidence.

Although mediation and post-sentencing restorative intervention is of benefit to the offender, its prevalence in prisons does demonstrate that the victim is increasingly able to contribute to the therapy and rehabilitation of the offender which in turn potentially impacts on the custodial sentence of the offender. This impact, where appeals have been exhausted, would then be taken into account when the offender is eligible to apply for parole.

Recidivist Offenders and Preventative Detention

This chapter now turns to consider the growth in preventative detention as a controversial move to extend the period of imprisonment of offenders deemed to be highly recidivist and beyond rehabilitation. While criminology has long dismissed the assumption of inherent criminality and questions data that certain populations are more likely to offend again (see McSherry and Keyzer 2009; Yung 2011; Keyzer and Blay 2006), the political imperative gained by the targeting of certain populations is powerful and schemes have emerged for extended detention beyond an offender's head sentence. While habitual criminals have been targeted in the past,[2] modern schemes focus on sex offenders as the at-risk population. While these programs are not justified out of reference to victims alone, but to broader community safety and the law and order movement, certain programs allow direct victim input where an extended detention order is sought. This section will consider those instances where victims have been able to participate in a preventative detention hearing allowing a substantive motion as to the detention that ought to apply to an offender in a particular instance.

In *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, the High Court of Australia determined that the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was indeed constitutional and allowed for the supervised release or further and potential indefinite detention of a sex offender, deemed to be at high risk of recidivist conduct. The offender must have been charged with a serious sexual offence, which includes an offence of a sexual nature, whether committed in Queensland or outside

Queensland, that involves violence, or is against a child; or against a person, including a fictitious person represented to the prisoner as a real person, whom the offender believes to be a child under the age of 16 years. Orders permitted under the 2003 Act include those available under s 13(5), specifically that the prisoner be detained in custody for an indefinite term for control, care, or treatment (a continuing detention order), or that the prisoner be released from custody subject to the requirements the court considers appropriate, as stated in the order (a supervision order). Either order may be considered where there is a need, founded in evidence, to ensure the adequate protection of the community from the offender. The state bears the onus of proving that the offender is a serious danger to the community in the absence of an order, and must satisfy the court, by acceptable, cogent evidence and to a high degree of probability, that the evidence is of sufficient weight to justify the decision.

The 2003 Act provides for victim participation in a hearing under s 9AA:

s 9AA Victim's submission relating to division 3 order

(1) As soon as practicable after the court sets a date for the hearing of an application for a division 3 order, the chief executive must give written notice of the application and hearing date to the following eligible person:

(a) subject to paragraph (b), the actual victim of the serious sexual offence for which the prisoner is serving a term or period of imprisonment;
(b) if the victim is under 18 years or has a legal incapacity, the victim's parent or guardian.

(2) The notice must invite the eligible person to give to the chief executive, before the date stated in the notice, a written submission stating:

(a) the person's views about any division 3 order or conditions of release to which the prisoner should be subject; and
(b) any other matters prescribed under a regulation.

(3) It is sufficient compliance with subsection (1) for the chief executive to give the notice to the eligible person at the eligible person's last-known address recorded in the eligible persons register.

(3A) The chief executive must, before the hearing, give the Attorney-General:

(a) if the chief executive received a submission from an eligible person in response to a notice given to the person under subsection (3)—the submission; or
(b) information that the eligible person has not given a submission in response to the notice.

(4) The Attorney-General must place before the court for the hearing of the division 3 order any submission received from the eligible person before the hearing date.

With regard to a hearing to determine preventative detention and the conditions that ought to apply, a s 9AA submission goes beyond an impact statement because it specifically invites a substantive motion from the victim. The victim may be invited to give a further submission where an interim order or supervision order is breached, requiring that the offender be brought back before the court.[3] The s 9AA submission goes to such issues as the offender's impending release, including conditions of release, the victim's thoughts on the appropriateness of that release, and may include a submission as to the need for continuing detention or conditions of supervision, should the court order that the offender be released subject to ongoing conditions. The Explanatory Notes accompanying the *Dangerous Prisoners (Sexual Offenders) Amendment Bill 2007* (Qld), inserting *inter alia*, ss 9AA, 21A and 49A, into the 2003 Act, indicate that the amendments intend to give voice to the victim during proceedings:

> Clause 1 introduces a new section 9AA. This section requires the Attorney General to give notice to victims of the prisoner for which the application for a division 3 order applies. This section is a requirement on the Attorney General to provide notice to the victim, which allows that victim to submit their views and provide information relevant to any application for a division 3 order or any conditions of release. Sub clause 3, 4, and 5 outline the operation for which the Attorney General must take to comply with the intent of the section. It also provides protection for victims if they do not wish to be identified.
>
> …

> Clause 5A again outlines provisions for victim submissions to be made at the time a further order is made. This means that the Attorney General must provide eligible persons the opportunity to present information to the court at the time of hearing and making final decision.

In *Attorney-General for State of Queensland v Burns* (2008) QSC 65, the Supreme Court of Queensland was asked to consider the appropriateness of a supervision order at par [17]:

> Submissions from victims are before the Court (s 9AA(4)). They express concern that in the event of the prisoner's being released, he must not make contact with the victims, or attend venues where the victims and other children play sport; concern if the prisoner were to move back to where his parents previously lived near a school on the Sunshine Coast; and concern that the prisoner should have no contact whatever, either directly or indirectly, with the victims or their family members. These are obviously important and naturally entertained concerns.

The views of the victim are therefore relevant to the setting of the order and to any conditions attached thereto. However, the court will continue to need to be satisfied of the validity of these opinions in accordance with the burden of proof placed upon the state. As such, submissions of victims may bear less weight when they depart from relevant background information and requests that are characterised in *Burns* as being those that can be 'naturally entertained' by the court. The court is more likely to accept a submission from the victim where they request no further contact with the offender, and that assigned conditions to the order reflect that request.

Section 49A of the 2003 Act deals with the nature of ss 9AA and 21A submission, specifically that the court should not disregard a submission from the victim because no harm was actually caused to victim by the serious sexual offence, for which the submission is given. The fact that a submission has not been placed before the court under ss 9AA or 21A does not give rise to the inference that the serious sexual offence did not cause the victim little or no harm or that the relevant victim has no interest in the outcome of the hearing.

Victims and Parole

Victims have a long and continued interest in the parole hearing given that parole may be granted to allow an offender to complete their sentence by remaining in the community. Understandably, some victims feel as though this represents the end of a prisoner's sentence. However, parole is not a certainty, and despite recent changes to the laws regulating the granting of parole making conditions more onerous and subjecting those who do not comply with parole conditions to further criminal action, access to parole remains an important component of the offender's rehabilitation and reintegration into the community.

Victims have the opportunity to participate in parole hearings by making a submission. This usually presents in the form of a VIS, which the committee will read in accordance with submissions from other parties, including the state, the offender, and corrections. In England and Wales, the Parole Board's Guidance, *The Parole Board's Duties towards Victims of Crime*, provides that victims may present a VPS pursuant to clause 2.2:

> Under the Code of Practice for Victims, the victim can choose to have the written statement placed before the panel for the panel members to read for themselves. Or, where the case is being heard at an oral hearing, the victim may:
>
> - request to be present and have the statement read on his or her behalf;
> - request to be present and read it in person; or
> - request that someone else attends to read it on his or her behalf; or
> - request to read the statement via Live-Link (if available); or
> - request to record it on audio/video tape or DVD for it to be played to the panel (if facilities are available).

The VPS will be used by the Parole Board to determine how an offence has affected a victim. It may provide context and information about the consequence of the crime. Although the Parole Board makes the decision as to the offender's ability to be released on license, and that the VPS cannot mandate a parole outcome, the VPS may contribute to a more developed understanding of the offence, its consequences and impact, and

may lead the Parole Board to ask more focused questions of the offender when they address their offending behaviour, remorse, and empathy for the victim. In relation to victim participation in the parole determination process, *McCourt v United Kingdom* (1993) 15 EHRR CD 110 ruled that the opinion of a victim as to the release of an offender was considered relevant to the Parole Board's determination as a matter of policy.

The statement submitted to the Parole Board will ordinarily indicate when the offence was committed, the impact of the offence and its lasting effect, any impact that the offender's release would have on them personally, as well as the impact on their family and potentially their community. The VPS should not contain a view as to risks posed by the offender's release where they do not have relevant or current information as to those risks, and should not include remarks that express an opinion of the offender or the Parole Board. Victims are encouraged to make use of the sentencing remarks of the sentencing judge, in order to direct comments toward issues that arose at the time of sentencing, and to make submissions as to whether those issues, as far as they may be related to the victim, persist.[4]

The rape and murder of Jill Meagher in 2012 and the subsequent realisation that the offender had been released on parole, with a history of violent sex offending and repeated violent offending whilst on parole, resulted in a review being commissioned on Victoria's parole system.[5] In his 2013 report, titled *Review of the Parole System in Victoria*, Ian Callinan AC examined the lack of victim input into parole decisions. Callinan (2013: 81) notes that the process tended to exclude victims' voices even if out of an excessive workload that did not afford time to properly consider the perspectives of the victim when the Board is making parole determinations:

> The first was that they felt that the Parole Board did not take sufficient account of their concerns when a prisoner is about to be released upon parole. It is difficult to deal fully with this complaint as I have not had the opportunity of looking at the specific cases, but I do not doubt that there is validity in it. This is not to suggest that an understandable wish on the part of the victim for revenge or the like, should be substituted for the prosecution by the State, and implementation of penalties by it upon offenders. But something does need to be done to ensure that victims' voices are heard and

> taken into account. As I point out elsewhere, the fact that they may not have been given due consideration is contributed to by the overwhelming burden of material and number of cases with which the Parole Board has to deal.

Callinan (2013: 94) recommended the following with regard to victim notification and participation in the parole granting process:

> Measure 12: For reasons which I have explained, victims' voices need to be heard and their views considered before any PDPs are released. Persons on the Victims' Register should be given timely notice of an offender's sentence, the possibility of an offender's parole and any likely considerations of it in order to enable victims to make submissions and such arrangements as they wish to make if parole were to be granted. Victims should also be informed no fewer than 14 days before the release of an offender on parole (Callinan 2013: 94).

Measure 12 arises out of the view that the grant of parole in Victoria had been seen as an entitlement by prisoners, such that the views of victims became irrelevant to the decision-making process. The course of law reform which followed Callinan's (2013) review introduced the *Corrections Amendment (Parole Reform) Act 2013* (Vic), which amends the *Corrections Act 1986* (Vic) and introduced the foundational test upon which parole will now be considered in Victoria. Section 73A of the 1986 Act now states that 'The Board must give paramount consideration to the safety and protection of the community in determining whether to make or vary a parole order, cancel a prisoner's parole or revoke the cancellation of parole'. The rights of victims to be informed of certain information relevant to the offender was contained in an amended s 33A, which provides that persons on the Victims' Register most be notified 'in respect of an offence for which a prisoner is serving a sentence of imprisonment of the release of the prisoner on parole'. Section 74A of the *Corrections Act 1986* (Vic) provides the basis for the written submissions of the victim:

> s 74A Victim submissions
>
> (1) A person included on the victims register may make a submission to the Board for consideration by the Board in determining to make a parole order under section 74.

(2) A victim submission:

(a) must be in writing; and
(b) must address matters relating to the person's views about the effect of the potential release of the prisoner on parole on that person; and
(c) may include comments from the person as to any terms and conditions to which the parole order may be subject; and
(d) must include any other prescribed matters.

(3) On receiving notification under section 30A(2) of the release or likely release of a prisoner on parole, a person included on the victims register who wishes to make a victim submission must make that submission within the time specified in the notification.

The Adult Parole Board of Victoria states that submissions from victims may be of assistance where the Parole Board determines whether particular parole conditions ought to apply to an offender. Submissions by victims are often relevant to geographical restrictions and other conditions that limit or prevent contact between parolees and victims. All submissions obtained by the Parole Board, whether a victim is on the Victims' Register or not, are potentially relevant to the parole decision-making process.

The Adult Parole Board of Victoria (2015) guidance, the *Secretariat Manual—Adult Parole Board of Victoria*, indicates that:

> Individuals included on the Register have the right to send a written submission to the Board when the prisoner for whom they are registered is being considered for parole. The Board also accepts submissions from victims who are not registered with the VSA. Victim submissions are treated as strictly confidential.
>
> All submissions and letters tendered by victims of crime are read by the Board and the issues and concerns raised are carefully considered as part of the decision-making process. (Adult Parole Board of Victoria 2015: 9–10)

Although the 2013 reforms to the Victorian parole processes do not grant victims any new rights of a substantive or fundamental character, the reconsideration of key tests for parole and the requirement that offenders only be granted parole as long as their risk to the community is negligible, focuses victims in the parole process in a new way.[6] The requirement that

the submission of a victim may be taken into consideration now stands to complement the processes of the Parole Board by informing the Board of the emotional impact of the offence on the victim but also of practical measures, which may be accommodated in a ruling by the Board. This is acknowledged in the *Secretariat Manual* and is further emphasised in the strategic plan of the Department of Justice and Regulation, Victoria, titled *Corrections Victoria Strategic Plan 2015–2018: Delivering Effective Correctional Services for a Safe Community*. This plan emphasises the need to maintain community safety and does so by acknowledging the rights of victim in the management of offenders in the community whilst on parole (see Department of Justice and Regulation 2015: 13).

Post-Sentencing Reforms and the Rights of the Victim

The continued interest of the victim in the appeal, punishment, and parole of the offender is evident from the number of recent reforms extending victim rights during this phase of the criminal trial. Victim rights in this phase of the criminal trial may not always carry substantive provisions that allow the victim to impact a decision to be made. Few enforceable rights have been granted. However, service and procedural rights are increasingly supporting victim interests and, importantly, these rights are connected to the substantive powers of the state such that the submissions made by victims are being increasingly recognised as important to determinations regarding the post-conviction status of the offender.

The rise of the recognition of victim rights in the appeal and post-conviction phase demonstrates an increasing awareness of the importance of victim rights across the different phases of the criminal trial. While the jury trial and sentencing, along with certain pre-trial processes, have attracted the attention of writers, few scholars have focused on the post-conviction phase as one that is relevant to the victim. The interests of the victim are increasingly piqued, however, during the post-conviction phase because it is increasingly identified as an arena of policy mobilisation and law reform. While victims have always held interests during this phase, for instance in the criminal appeal process where important decisions made

during the trial may be overturned or reversed, other post-conviction processes have come to avail the victim of opportunities for enhanced participation. The increased use of preventative detention, while controversial, has allowed for increased substantive input into the extended incapacitation of offenders that present a real risk of recidivist behaviour. The scrutiny of the adult parole processes and the questioning of the assumption of the offender's automatic right to parole as a limit to any possible victim input into parole decisions have been noted as a risk to victims and the community alike.

The development of the role of the victim in the post-conviction phase spans the differential rights of the victim, specifically, service, participatory, and enforceable rights. While there is a tendency to provide more service level rights to information, the greatest movement concerns the enhanced participation of the victim in key decision-making processes together with enforceable rights of a substantive character, regarding rights to consult or confer, and to make submissions on the custodial status of the offender regarding preventative detention and parole.

Notes

1. See NSW *Code of Practice for the Charter of Victims' Rights* (Victims Services, NSW Department of Justice 2015: 30): 'Victims Registers will: record the names and contact details of victims who have asked to be registered in order to receive information about an offender or forensic patient; facilitate victims making submissions to relevant decision-making authorities in line with applicable legislation for each organisation; provide victims of crime who have safety concerns about the release of an offender, with information that will assist them in taking the steps they feel are necessary for their own protection; and advise the victim of the offender's proposed release date; if the offender escapes; of any change in security classification that results in the offender being eligible for unescorted absence from custody; if an offender's release is to be considered by a releasing authority; if an offender is returned to custody having breached the conditions of parole; if the revocation is subsequently rescinded and the offender is returned to the community prior to expiry of the sentence in full, in relation to which they are registered.'
2. See *Strong v R* (2005) 224 CLR 1 regarding the validity of the offender's sentence under the *Habitual Criminals Act 1957* (NSW). The offender

was sentenced for offences of stalking and intimidation and then pronounced a habitual criminal and sentenced to further concurrent term of imprisonment. The High Court dismissed the appeal but Kirby J took the opportunity to review the legislation, noting that at par [62] 'The Law Reform Commission recorded that the Office of the Director of Public Prosecutions at that time was in favour of repeal of the Habitual Criminals Act and that already the Act had 'fallen into disuse'. Nevertheless, the Act was not repealed. It remains part of the law of the state. Over the last decade, in the way of these things, there has been a revival in Australian law of notions of preventive detention for 'the protection of the public'. This has been given effect in legislation providing for lengthy mandatory imprisonment for repeat offenders; additional sentences of indefinite detention; and specific legislation addressed to certain long-term prisoners. As long as such laws are constitutionally valid, when they are invoked (as here), it is the duty of courts to uphold them and of sentencing judges to apply them in accordance with their language and purpose. In the present appeal, no challenge was raised to the constitutional validity of the Habitual Criminals Act.

3. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 21A. Victim's submission relating to further order (1) As soon as practicable after the court sets a date for the hearing for making its final decision under section 22 in relation to the prisoner, the chief executive must give written notice (hearing notice) of the issue of the warrant and hearing date to the following eligible person: (a) subject to paragraph (b), the person mentioned in section 9AA(1)(a) as the actual victim of the serious sexual offence for which the prisoner was serving a term or period of imprisonment; (b) if the victim is under 18 years or has a legal incapacity, the victim's parent or guardian. (1A) However, subsection (1) does not apply if: (a) the chief executive has already given the eligible person a hearing notice for the prisoner; and (b) the person has informed the chief executive that the person no longer wishes to receive hearing notices for the prisoner. (2) The notice must invite the eligible person to give to the chief executive, before the date stated in the notice, a written submission stating: (a) the person's views about any further order or conditions of release to which the prisoner should be subject; and (b) any other matters prescribed under a regulation. (3) It is sufficient compliance with subsection (1) for the chief executive to give the notice to the eligible person at the eligible person's last-known address recorded in the eligible persons register. (3A) The chief

executive must, before the hearing, give the Attorney-General: (a) if the chief executive received a submission from an eligible person in response to a hearing notice—the submission; or (b) information that the eligible person has not given a submission in response to a hearing notice; or (c) information that the eligible person has informed the chief executive that the person no longer wishes to receive hearing notices for the prisoner. (4) The Attorney-General must place before the court for the hearing of the division 3 order any submission received from the eligible person before the hearing date.

4. See also Parole Board (2015) *Information for Victims*, UK Government.
5. The sentencing report for Adrian Bayley is contained in *The Queen v Bayley* (2013) VSC 313. The unsuccessful appeal against his minimum term is contained in *Bayley v The Queen* (2013) VSCA 295.
6. England and Wales is in the process of modifying their monitoring of paroled offenders. The *Criminal Justice and Courts Act 2015* (UK) makes further amendments to the parole provisions of England and Wales by providing for the electronic monitoring following release on licence, recall adjudicators, tests for release after recall for determinate sentences, creation of relevant offences, including the offence of remaining unlawfully at large after recall.

7

Compensation and Victim Assistance

From Welfare to Restitution: Reform Agendas and Shifting Policy

Victims' access to compensation was initially justified to support the healing of the victims of crime following the state's failure to apprehend crime and secure the peace. Payments to victims initially accompanied sentencing proceedings as a separate civil claim, requested by the prosecution or occasionally, victims themselves. Claims were determined on the basis of the facts in evidence before the court at trial or in sentencing. This meant that only where matters were reported to police and proceeded with by the prosecution all the way to sentencing would a claim for compensation be possible. The terminology that comprised initial compensation schemes is also significant. Although the term 'victim compensation' is used widely to describe the offering of awards and *ex gratia* payments to victims, the initial reference to criminal injuries compensation, a term still used in the UK, refers to the absence of the victim and an acknowledgment of the injury, or the consequence of the criminal conduct, that constitutes the injury as a manifestation of criminal harm.

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The criminal injuries compensation schemes of the 1970s gave rise to victims' compensation in the 1980s and 1990s, when the responsibility for determining claims also shifted, depending on the jurisdiction, to tribunals or state departments. Although criminal injuries as a defining term is still in use, the mode of assistance now available has shifted from its connection to the criminal trial, operating instead in a policy context of supporting and assisting the victim's recovery. The continuation of the development of compensation is evidenced by shifts to service provision throughout the 1990s, including medical treatment and access to counselling, with tariffs placed on the amount of compensation claimable (Shapland and Hall 2007; Green and Diaz 2007). This evidenced a significant move from awarding compensation as attached to or defined by the criminal incident as evidenced at trial, to a framework of awards for injuries based on the severity of the injury and costs incurred as a result of the injury. Compensation is now provided on the basis of a combination of eligibility criteria, including that the injury was caused by a crime of violence, that the offence is reported to the police, and that the victim incurs an injury and expenses under recognised heads of loss.

Changes to compensation arrangements that direct victims to ongoing or early assistance and support rather than one off or *ex gratia* payments for minor offences in particular and the connection of this assistance to modes of non-pecuniary support, mainly through non-government organisation (NGO) participation in agency agreement with the state, demonstrate a further development away from criminal injuries compensation and restricted access to awards (see Home Office 2005). This shift, which is becoming increasingly prevalent across compensation schemes, attempts to address the immediate needs of victims to encourage their restoration and rehabilitation, rather than rely on larger awards that may take years to determine and settle. The current scheme in the UK, throughout England and Wales, and in Scotland, operates under the *Criminal Injuries Compensation Act 1995* (UK), and the recent reforms in New South Wales, under the *Victims Support and Rehabilitation Act 2013* (NSW), demonstrate policy changes that restrict awards of compensation while providing new tests for the provision of compensatory measures for victims. While victim support through immediate service delivery occurs beyond the criminal injury compensation scheme in the UK, NSW retains this as

part of its movement toward improving access to counselling and small costs reimbursement.

While victims' compensation as a state award not connected to criminal proceedings recognised the victim as a stakeholder of justice separate from the offence and offender, reforms to policy are increasingly revoking the victim's access to compensation unless specific qualifying criteria are met. This includes mandatory reporting to the police, and the offering of assistance to authorities in their investigation of the crime, in addition to a range of conditions that assess the victim's character. Where the character of the victim and their identification as an innocent, benevolent, and deserving person are compromised by unspent convictions, access to compensation may be withheld or reduced (see Miers 2014a).

While compensation as an apparatus of victim support is transforming to immediate needs and service provision, claims for restitution and state based compensation are also being reintroduced into the courts in order to have the offender restitute the victim and society. In England and Wales and South Australia, a sentencing court may now determine restitution from the offender as part of the offender's sentence. Where it is not practicable to order restitution from an offender, the victim may continue to seek state-based compensation, although the latter is not able to be taken into account as a mitigating circumstance during sentencing. In England and Wales, compensation orders seeking restitution from the offender to the victim are permitted under the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 130 (as to restitution of stolen property see ss 148–149). Compensation is identified here in general terms, for any injury, loss, or damage resulting from an offence before the court, or specifically in terms of compensation for funeral expenses or for bereavement. In South Australia, the *Criminal Law (Sentencing) Act 1988* (SA) s 53 provides courts with the power to award the victim for any injury, loss, or damage resulting from an offence of which the defendant has been found guilty. Other schemes allow for restitution, although no provision is made to take this into account in sentencing. However, courts may retain the common law power to identify voluntary restitution or return of property as mitigating factors in sentencing, even where such acts are not recognised by statute. For example, the *Victims Support and Rehabilitation Act 2013* (NSW) Pt. 6 retains the powers of a court to

provide compensation to a victim for injury or loss as an alternative mechanism for the payment of compensation, including restitution from the offenders themselves, although there is no requirement that the court takes this into account in the determination of the offender's sentence.

The power of the ICC to assess the harm done to victims to provide reparations as a civil claim in proceedings is an important adjunct that facilitates the holding to account of war criminals and provides a measure of restoration and chance of recovery for victims of acts of gross human rights violations. Although reparation is a key power of the ICC exercisable in any trial, the ability to extract money from war criminals or the former state that may share complicit liability may be limited. Where an offender is unable to meet a reparations order, victims may be compensated out of a trust. Other issues include the ability to identify victims in the first instance and the ability to identify causation between state and offender responsibility and the exacting of harm to victims. The inability to distribute reparations to multiple victims, possibly thousands, may result in the establishing of community goods in favour of direct payments, including the erection of epitaphs memorialising the harms or atrocities committed against victims (see Sharpe 2007; de Greiff 2006).

Comparisons across different jurisdictions demonstrate that traditional models of state-based compensation have come under budgetary pressure, and together with a general critique of the insufficiently targeted nature of once and for all compensation, this has led to a reconsideration of the ways in which victims are supported financially. Increasingly, this means that many victims are not afforded awards of compensation but are offered support and assistance, including counselling, court-based support, or material assistance (such as new locks for doors, dental work, or individual medical bills covered in exchange). The relocation of compensation from tribunals back to sentencing courts, so that compensation claims and restitution from offenders can be factored into sentence, complements a broader movement to offer assistance to victims in different ways, to meet the needs of victims at different phases of the trial process. While this necessarily complicates the offering of compensation and assistance, it demonstrates that the system of payments originally devised as an adjunct to criminal proceedings based solely on the criminal act has declined for a range of policy objectives that seek to restore and

rehabilitate the victim, which may include a limited award of damages as recognition, or an award for specific loss and damage, such as funeral expenses, loss of earnings, bereavement, or dependency payments.

The History of Criminal Injuries Compensation

Compensation for criminal injuries first came into effect in New Zealand in 1963, following calls for the reimbursement of victims for the costs of crime by English penal reformer and magistrate Margaret Fry. Several jurisdictions followed this suggestion, and by the 1970s most common law countries had a compensation scheme established to compensate victims, usually at the time that the offender was sentenced. Compensation was advocated as a mode of welfare for victims who otherwise went unsupported, having to manage their injuries and trauma using existing welfare structures and facilities (see Miers 2014b). Although justified as a mode of welfare intervention, the original compensation schemes borrowed from tort in terms of defining a calculus of damages based on a schedule of injuries in order to determine an appropriate quantum of damages. Although no scheme was truly reflective of common law tort, to which the victim retained access if they sought damages in excess of the amount awarded under the statutory scheme, the principles of liability and quantum of damages were borrowed from tort and helped inform the initial schemes.

Aspects of this original system survive across the modern compensation programs of today, but policy intervention over decades has distanced such programs from their original focus on tortious payments and as a discrete civil claim in sentencing proceedings to a range of services and individual payments for particular injuries or heads of loss, as based on definitions of violence, up to a statutory maximum. In England and Wales, compensation is set at a maximum of £500,000, which may be reduced depending on the injury sustained and where other criteria are not met. The maximum for an individual injury is set at £250,000, with a £1000 minimum award threshold. In NSW, *ex gratia* payments are now strictly limited to a maximum $15,000 recognition payment, with most victims receiving far less. Instead, the victim is directed to services and

immediate payment for a grant, allowance, refund of expenditure, direct payment of an invoice, or other service that the victim accessed following the offence.

Compensation schemes in most jurisdictions have gone through various iterations, and it is difficult to generalise across schemes because the detail of each flows from a set of policy considerations that restrict access to compensation against different thresholds and tests. While most are constrained to compensating certain types of injuries, or injuries that result from acts of violence associated with a criminal act, the calculus of damages that may result, the time at which a victim may apply, whether assessment occurs by government department, tribunal, or court, and the extent to which damages follow the common law approach of awarding once and for all payments, varies significantly. Increasingly, jurisdictions are moving away from once and for all payment for compensation for discrete injuries and needs that arise out of the offence, although most jurisdictions retain some semblance to the common law approach.

A common thread, however, in the development of most compensation schemes is the increased control governments have sought over eligibility and claims management, with a general tendency to restrict eligibility and award entitlement in favour of budgetary control, and to allow for the timely processing of claims. As this chapter demonstrates, however, the politics of victim rights demands access to compensation, and any government that neglects to consider victims' access to payments following especially violent offences risks harsh judgment by victims, media, and society generally. In the NSW example, this forced a retreat on the movement of all claims to the post-2013 calculation of payments, to avail victims formerly in the system access to more generous pre-2013 awards.

The Development of Victim Compensation in the UK

The criminal injuries compensation scheme introduced in 1964 provided compensation based on tortious liability as a civil wrong. Although guided by reference to violence crime, compensation was primarily assessed with regard to personal and fatal injury litigation (Miers 2014a). The *Criminal Injuries Compensation Act 1995* (UK) introduced

a new framework that came into effect in 1996. This Act supplied a tariff of awards payable to victims based on injuries organised by reference to comparable level of harm. The 1995 Act thus distanced awards from common law damages as a means of assessment. However, such principles continued to bear relevance in terms of awards for loss of earning capacity, bereavement, and dependency. The 1995 Act also established a review process by allowing matters to be appealed to the Criminal Injuries Compensation Appeals Panel. The legislation was amended in 2001 and 2008 to allow for further changes to the appeal process, transferring cases to the First-tier Tribunal established under the *Tribunals, Courts and Enforcement Act 2007* (UK).

The 2012 changes to compensation, however, marked a more significant shift to restrict awards to victims. The consultation paper, *Getting it Right for Victims and Witnesses*, set out the guiding principles by which reforms ought to advance. These restrictions were made in the context of the government's continued commitment toward victims in the criminal justice system, especially victims of violent offences.[1] The changes were intended to deliver a more accessible service to victims, by giving support to those victims most in need, that help ought to be timely, by recognising the different needs of communities across England, and that reparations from offenders ought to form part of the compensable award. The changes gave effect to these policies by focusing on serious, repeat, and vulnerable victims subject to violent offending, policies that required offenders to take more moral and financial responsibility for their offences, increases in the surcharge, and the increased power of the courts to order that the offender provide restitution to the victim. Changes were based on providing access to compensation that met local and EU obligations, that only innocent victims be compensated, and that they mete out compensation to those with significant injuries or those requiring treatment over the long-term. The use of social security as a substitute or support mechanism was also considered (see Ministry of Justice 2012a; Ministry of Justice 2012b: 49–83).

Other changes that reconnect victims to services and providers to improve victims' experience within the criminal justice system were also made. These additional changes regard access to restorative justice and the use and reception of VPS as covered in Chaps. 3 and 5 respectively.

The Development of Victim Compensation in NSW

Victims' compensation in NSW developed out of the capacity of the court to make an award of damages for compensation after hearing the case and determining sentence. Section 437 of the *Crimes Act 1900* (NSW) allowed all courts with a civil jurisdiction to make a determination of compensation for personal injury to be paid out of state funds once the court had heard all the evidence in the criminal matter. The state was also empowered to recover the amount awarded from the offender. In 1987, s 437 was repealed and the *Victim Compensation Act 1987* (NSW) instead provided victims' access to compensation. This Act established the Victim's Compensation Tribunal but also allows the courts to award compensation during sentencing. The Act provided that a magistrate of the Local Court could constitute the tribunal. The 1987 Act also provided more guidance to the court as to who may be eligible, based on definitions according to primary victim, secondary victim, close relatives of the primary victim, or law enforcement victims. Maximum compensation was set at $50,000. Courts were also required to assess, pursuant to s 55:

(a) any behaviour, condition, attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person;
(b) any amount which has been paid to the aggrieved person or which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted; and
(c) such other matters as it considers relevant.

In 1996, the *Victims Compensation Act 1996* (NSW), later retitled the *Victims Support and Rehabilitation Act 1996* (NSW), was introduced and abolished the first iteration of the Victims' Compensation Tribunal. A new Tribunal was introduced to hear and determine matters, essentially continuing the old Tribunal but under the new legislation. The changes introduced by the 1996 Act included the introduction of a tariff of awards against individual injuries. Tariffs were organised according to seriousness of harm to the victim, up to a maximum of $50,000. The schedule of tariffs

replaced the previous discretionary approach. Access to 20 hours of counselling was also provided for. Applications for compensation continued to be determined by a magistrate, with compensation assessors appointed to assist with the determination of claims. Restitution from the offender was also formally provided for. Appeal from a decision of the Tribunal could be made to the District Court. Responsibility for the determination of claims was later moved to Victims Services, with appeals pending to the Victims' Compensation Tribunal. Threshold amounts were provided that where a claim fell below $7500 no compensation was payable. This meant that most victims, where injured by a criminal act, but whose injuries were not deemed to be substantial enough to meet the threshold, would not be provided an award of damages. This threshold did not apply to compensation payable to family victims or for expenses incurred under victims' assistance.

In 2012, PricewaterhoueCoopers (PwC) was commissioned by the NSW Attorney-General to independently review the victims' compensation fund. The scope of the review included the detailed financial projection and analysis of the current scheme, development of a profile of victims eligible for compensation, the examination of options for alternative ways to provide support and rehabilitation services to victims of violent crime, the examination of ways to fund options identified, and the determination of a strategy to address the accumulated liability for lodged but unresolved claims (PwC 2012: 3). The review of the compensation fund resulted in a number of views emerging as to the components of an ideal system. These included (PwC 2012: 48):

- Assisting victims at the earliest point after which the act of violence occurs delivers the best outcomes. The scheme should therefore provide financial assistance to meet the immediate needs of a broad range of victims.
- The provision of counselling is considered an important aspect of the scheme. The current Approved Counselling Scheme should continue in its current form, with some minor changes to improve the accessibility and amount of counselling available.
- The scheme should recognise that acknowledgment by way of a lump sum payment is an important part of the rehabilitation process of victims who have suffered from violent crime.

The report prepared by PwC (2012) proposed several pillars intended to support victims throughout the recovery process. Pillar 1 provided access to counselling. This pillar was designed to be accessed at any point in the claim process. Pillar 2 gave access to expense reimbursement for immediate needs. This would cover costs associated with escaping violence, such as short-term relocation, crime scene clean-up, security upgrades, funeral costs, and urgent medical and dental work. Pillar 3 sought to give victims financial support according to their need for it. This may cover shortfall expenses that result from medical or dental expenses plus loss of income that results from escaping violent crime, such as domestic and family violence. Pillar 4 provided for a recognition payment. This payment sought to provide victims with a moderate award of damages for trauma, and to provide a recognition of the state's expression of sympathy and regret. It was recommended that changes to Victims Services be introduced to allow for case management to enable victims to navigate the different services and support mechanisms available according to the stages of an application.

In May 2013, NSW Parliament passed the *Victims' Rights and Support Act 2013* (NSW), which instituted many of the recommendations provided by PwC (2012). Although not universally supported,[2] the old scheme was replaced with a Victim Support Scheme that sought to provide a package of care that may include access to some or all of six types of support: information, referrals and advice; counselling; financial assistance for immediate needs; financial assistance for economic loss; and a recognition payment. Compensation was payable for those offences that involved an act of violence, referring to an act or series of related acts, whether committed by one or more persons that has apparently occurred in the course of the commission of an offence, and that has involved violent conduct against one or more persons and has resulted in injury or death to one or more of those persons pursuant to s 19 of the 2013 Act. Particular definitions are also supplied for sexual assault and domestic violence that involve a personal violence offence.

The 2013 Victim Support Scheme provides the following material benefits to victims. Access to information is provided by Victims Services and is available to all victims. Counselling needs to be approved but upon application a victim may be able to access an initial 10 hours of counselling with a further 12 provided, if required. Financial assistance for immediate needs

was provided to the extent that it may assist a victim to relocate to a safer location, implement safety measures, or assist with crime scene clean up, to a total of $5000. Funeral costs were met separately, limited to $8000. Financial assistance to aid rehabilitation or recovery was further provided for. This included expenses to recover costs for reasonable travel expenses, medical and dental expenses, assistance with the cost of living, and child-care and household bills. This amount would be limited to $5000 for those victims who were not employed at the time of the offence. Expenses related to the damage of personal property were limited to $1500. Expenses associated with meeting the needs of justice, such as attending hearings, was limited to $5000. Loss of income was limited to $20,000. The total limit that may be provided under this section was set at $30,000.

Recognition payments are set to a maximum of $15,000 for a financially dependent family of homicide victim; $7500 for non-financially dependent parents of homicide victim; $10,000 for sexual assault involving serious bodily injury, multiple offenders, or use of an offensive weapon, or where there is a pattern of sexual or indecent assault/attempted sexual assault involving violence; $5000 for sexual assault, attempted sexual assault involving serious bodily harm, or a pattern of physical assault of a child; and $1500 for indecent assault, or attempted sexual assault involving violence, robbery, or assault. The scheme was touted as removing the need for a lawyer to be substituted instead of a support person from Victims Services.

Avenues for appeal were also modified by the 2013 Act. Appeals against award determination now no longer proceed before the Victims Compensation Tribunal. Rather, appeals proceed to the Civil and Administrative Tribunal, and only with respect to recognition payments awarded. Other payments, including victims support, may be subject to an internal review by Victims Services.

The Deserving Victim: Limiting Awards and Payments

Changes to the UK compensation arrangements may be critically appraised from a number of perspectives. These comments culminate in the final section of this chapter, regarding the extent to which both

schemes manifest in the departure from a model of compensation as welfare intervention for the neo-liberal government of the victim as a *prima facie* deserving person, as someone who has carefully managed their lives to avoid crime, offending and circumstances that may otherwise render them of ill repute. The limits on compensation and the expenses that are now subject to reimbursement demonstrate that compensation is preserved for the self-responsible, deserving victim of good repute.

The 'Crime of Violence' Requirement

The UK scheme requires that those victims of a 'crime of violence' ought to be compensated. This is squarely recognised in the history of the UK compensation framework and in its current form. The compensation arrangements in NSW share this focus on violence as a threshold test. The Ministry of Justice (2012b: 52) consultation paper recognised the centrality of the notion of crime of violence to the compensation determination process:

> The main purpose of the Scheme is to provide payments to those who suffer serious physical or mental injury as the direct result of deliberate violent crime, including sexual offences, of which they are the innocent victim. This purpose underpins all of our proposals, and it reflects the current Scheme.

The Ministry of Justice (2012a) sets out the administrative requirements of compensation and provides an expanded definition of crime of violence in Annex B. This definition provides a policy framework to understand crimes of violence as a threshold test. The Annex refers to notions of violent conduct familiar to the criminal law, and it is not reduced to or restricted by any criminal law definition of the term. As a matter of policy, it is generally well understood and applied. However, there have been cases that test the boundaries of the definition and the extent to which a victim's injuries relate to a crime of violence that resulted from an act or omission done intentionally or recklessly. Where a matter is brought to trial and the offender is found guilty, satisfaction of the requirement that

the injury resulted from a crime of violence will be made easier. Where no offence is prosecuted, the task will be more difficult, particularly where the offender did not intend the consequences of the crime of violence (see Miers 2014a: 254).

Several cases may be instructive here, but those injuries that arise from an act done by a child who does not bear criminal responsibility for the act by virtue of age alone demonstrate the requirements of Annex B. *Blake v Galloway* (2004) 3 All ER 315 provides a useful set of circumstances for analysis. In this case, a child caused serious injury to another child's eye by throwing a piece of bark. Characterised as 'horseplay' between children, the Court of Appeal (Civil Division) held that the children accepted the risks of the game and that there is a breach of the duty of care only where the defendant's conduct amounts to recklessness, or a very high degree of carelessness. This incident could be characterised as an unfortunate accident. To extend these facts to the 2012 scheme, awards of compensation would not follow unless a level of recklessness or intent was reached, despite the age of the child precluding a criminal charge. Rule 3 of Annex B sets out the requirement that in exceptional cases an act committed by a child may be treated as a crime of violence. In order for the act of the child to fall within the definition of crime of violence, a child below the age of criminal responsibility will be required to have 'understood the consequences of their actions' (Ministry of Justice 2012a: 36). Most injuries resulting from childish horseplay would fall well below that threshold. Additionally, compensation would not be available where there ought to have been adequate supervision provided, as would be expected in a school playground. In such instances, the claimant would have to seek relief from tort, where available.

The availability of compensation for children born with foetal alcohol spectrum disorder, a condition arising where the mother consumes excess amounts of alcohol during pregnancy, is also limited in accordance with the definition given to 'crime of violence'. In *CICA v First-tier Tribunal and CP (CIC)* (2013) UKUT 0638 (Administrative Appeals Chamber AAC), the Upper Tribunal (AAC) held that the claimant was not entitled to criminal injuries compensation in respect of her claim because there was no coincidence between the act to the still unborn foetus and the

intent of the mother to do harm. The relevant passage of the judgment summarises the authorities and clarifies the principle at par [18]:

> The point here is that the *actus reus* and the *mens rea* must coincide in time (*R v Jakeman* (1982) 76 Cr App R 223; *R v Miller* [1982] 1 QB 532). If the *actus reus* is a continuing act this rule is satisfied if the defendant has *mens rea* during its continuance (*Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439). Applying these basic rules to the present case, even if her mother had the necessary *mens rea* while CP was still a foetus, there was no 'another person' and there was no *actus reus* at that time. However, Mr Foy supported the approach of the First-tier Tribunal on the basis that the *actus reus* of the section 23 offence includes both action and consequences, the consequences occurred or continued at or after birth (at which point CP became 'another person') and the *mens rea* could be linked with the *actus reus* at that stage.

The Upper Tribunal (AAC) quashed the decision of the First-tier Tribunal and substituted the ruling that the Criminal Injuries Compensation Authority was not liable for compensation in this case.

Other cases where claims may be denied include railway workers observing a suicide. The crime of violence requirement will generally exclude a person committing suicide. as this is not an act that satisfies the definition of crime of violence unless, as stated in Rule 4 of Annex B, that the suicidal person acted within intent to cause injury at the time of their suicide (Ministry of Justice 2012a: 36). Railway workers were said to be able to access compensation on the basis that those persons committing suicide were committing a trespass on railway property prior to their acts of suicide. This stood against the experience of bus drivers observing a suicide. The difference here was that no trespass was committed prior to a road-based suicide (see Miers 2014a: 256).

The Innocent Victim

The 2012 scheme reiterates the desirability of granting innocent victims access to compensation. The 2012 changes provide that victims who are blameless of their injuries and trauma, and who have not brought about

their suffering through deliberate act or omission, are entitled to compensation. Blamelessness in respect of a criminal act derives from a complex association of social forces in which one of the participants to a crime becomes labelled as innocent out of their lack of knowledge or association with the causes of the injury. However, the terms 'victim' or 'injured party' may be ascribed socially, as much as it may result from forensic processes that identify the person who is the recipient of violence.

Cases where the victim consents to sexual intercourse but not to the transmission of a sexual disease present a challenge for the 2012 scheme. In *R v Konzani* (2005) All ER (D) 292, the accused transmitted HIV to the victim following consensual intercourse. The accused did not inform the victim of his positive status prior to intercourse and thus committed an offence under s 20 of the *Offences Against the Person Act 1861* (UK). The issue here, as noted by the Court of Appeal (Criminal Division), is whether the victim gave consent to matters upon which she can reasonably be assumed to have been ignorant. Although this may be resolved under criminal law as indicating a lack of consent to injury, it makes determination of compensation more problematic as the ignorance of the victim may not amount to innocence, should such a claim be made under the 2012 scheme. Although controversial, denial of a claim on the basis of transmission of a bodily disease goes toward the problem of making distinctions between the recklessness of the victim on one hand, or their negligence on the other. Despite the withholding of vital information by the offender, compensation is generally only available where the victim did not assume risks of infection that, arguably, may be present where any person engages in unprotected intercourse.

The victims (and offenders) in *R v Brown* (1994) 1 AC 212 more clearly demonstrate how blameworthy victims may be excluded from the scheme. In this case, willing participants engaged in sadomasochist acts causing injuries to each other's bodies, which, by reason that you cannot give consent to higher levels of serious bodily harm, amounted to an offence. The injuries could easily be described as arising from a case of violence with intent, given the charges of occasioning serious bodily harm. However, the conduct of the accused could never give rise to an award of compensation, on the basis that the acts and injuries were willed by the victims.

The Good Citizen

One of the requirements of the 2012 scheme is that the victim must be willing to assist the police by reporting the offence that gave rise to their criminal injury as soon as is practicable. The Ministry of Justice (2012a: 13) provides this requirement under clauses 22 and 23 of the policy setting out the compensation framework:

> 22. An award under this Scheme will be withheld unless the incident giving rise to the criminal injury has been reported to the police as soon as reasonably practicable. In deciding whether this requirement is met, particular account will be taken of:
>
> (a) the age and capacity of the applicant at the date of the incident; and
> (b) whether the effect of the incident on the applicant was such that it could not reasonably have been reported earlier.
>
> 23. An award will be withheld unless the applicant has cooperated as far as reasonably practicable in bringing the assailant to justice.

Victims that were too young or too traumatised to report to the police will not be held to this standard. A victim so badly injured that they were unable to report in a timely manner will also be excused. In *R (JC) v First-tier Tribunal Criminal Injuries Compensation: Reasons* (2010) UKUT 396 (AAC), for instance, the claimant was deemed to be too traumatised to report her assault in the required timeframe. In *R (RW) v First-tier Tribunal (CIC)* (2012) UKUT 280 (AAC), a retired police inspector had his claim denied on the basis of a delay in reporting of approximately 1 month. The incident involved several youths throwing objects at the victim's car, one of which struck the victim in the eye when he got out of his car to see what was going on. The victim gave the reason that 'I am an ex-policeman and I knew it would be impossible to trace the youths and I did not want to waste their time' as his justification for not immediately contacting the police. The Upper Tribunal reviewed the reasoning of the victim and overturned the earlier decision of the panel to reject the claim at par [27]:

> … in considering whether the claimant took 'all reasonable steps' to inform the police, regard must be had to the position as it would have appeared to him at the time. It is important in this case that the claimant says that he did not at first think his injury was particularly serious. Not only are the police likely to invest resources in an investigation in proportion to the seriousness of the alleged offence, which is often determined by its consequences, but a minor injury that passed quickly would not be one in respect of which any claim for compensation could be, or would be, contemplated. In the present case, this is particularly significant because, even if there might have been some prospect of the assailant being apprehended if the incident had been reported immediately, the prospect of that being so by the time that the claimant realised the injury was serious enough for him to need medical advice would have been very much lower and possibly non-existent. During the period when delay was more likely to be material, the claimant in this case may actually have had a better reason for not acting.

The decision of the panel was quashed and the matter remitted to the First-tier Tribunal to be decided in accordance with the reasons of the Upper Tribunal.

Compensation, Restitution and Sentencing

Sentencing courts are increasingly being granted the power to order that the offender compensates the victim for the loss that they incurred in the course of their offending. Although courts have long enjoyed the capacity to make a compensation order for restitution at the time of sentencing, these orders have traditionally been a civil order not connected to the sentence of the accused. Increasingly, however, courts have the power to make a restitution order and to factor this into the sentence of the accused. This approach, available in England and Wales under the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 130 (as to restitution of stolen property see ss 148–149), and in South Australia under the *Criminal Law (Sentencing) Act 1988* (SA) s 53, grants the court the capacity to order repayment of a loss caused to a victim and to weigh this into the determination of a proportionate sentence. The holding of offenders to account by requiring that they pay victims back is consistent with the current policy

approach in England and Wales in accordance with the policy response of the UK Government, *Breaking the Cycle: Government Response* (Ministry of Justice 2011: 5):

> We will make offenders pay back to victims and society for the harm they have caused – both directly and indirectly.

The use of restitution suits those cases where the offender is convicted of an offence for which they have stolen or damaged property, or caused some other material loss subject to a liquidated claim. In *Brooks v Police* (2000) SASC 66, Bleby J regards the offender's willingness to pay compensation or perform an act of restitution as an important indication of contrition, an act long considered relevant to sentence:

> It can be seen that the Sentencing Act gives some prominence to the question of compensation to victims … where a defendant exhibits genuine contrition borne out of a desire to pay compensation, but does not have the means to pay it (usually because the defendant never has had the means), and where it can be seen that some payment, periodic or otherwise, which the defendant can afford, may well have some therapeutic benefit in the rehabilitation of the offender, it can become a useful sentencing tool. This is so particularly where the alternative of imprisonment will mean loss of a job, a negation of any ability to pay compensation or to reimburse the Attorney-General, and a denial of any opportunity to the offender to become a useful member of the community.

Justice Bleby's dicta has been supported in *Mile v Police* (2007) SASC 156, where Sulan J states:

> During the course of the appeal, a question arose whether the order for compensation, which was a condition of the bond imposed by the Magistrate, was required to be taken into account in determining the final penalty. Whether payment of compensation or the court ordering a defendant to pay compensation is to be taken into account as part of the sentence was discussed by Bleby J in *Brooks v Police*….

Section 10(1)(f) of the Act provides that a court, in determining the sentence for an offence, should have regard to:

> … the degree to which the defendant has shown contrition for the offence:
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
> (ii) in any other manner …

The conflation of compensation and punishment brings the victim into consideration in the sentencing process in new ways. The desirability of restitution goes toward the extent to which the offender ought to receive a sentencing discount by demonstrating that they are willing to make things right by promising to repay the victim. An issue of equity arises where the offender lacks the means to repay. However, courts are open to the opportunity to request that the offender repay where the facts indicate that this will assist their recovery, and enable the restoration of the victim. Additionally, under the UK and South Australian legislation, the court is required to give reasons if it does not make a compensation order where the facts allow it to do so. This indicates that both Parliaments have chosen to direct that the courts actually consider restitution in sentencing, and that courts ought to make a direction requiring the offender repay the victim where the offender has means to do so.[3]

The scope of s 53 as a mechanism for the inclusion of the victim is limited, however, in accordance with the capacity of the offender to compensate the victim. The matter of *Paull v Police* (2015) SASC 25 demonstrates the willingness of the court to review the initial sentence requiring the offender compensate the victim where the compensation order is beyond the means of the offender.[4] In this case, the offender stole petrol when he made off without payment. He was charged with three counts of theft and seven counts of making off without payment. The original sentence was a total sentence of 6 months' imprisonment, reduced from an initial 8 months on account of an early guilty plea. The Magistrate did not suspend the sentence. The offender was also ordered to pay compensation in the amount of $815.84. On appeal, the court ruled at pars [36–37]:

> The Magistrate made particular reference to the appellant seeking to make an arrangement with the Fines Enforcement and Recovery Officer upon the appellant's release from custody. It is evident that the Magistrate was satisfied that the appellant could not comply with the order to make payment of compensation within 28 days of the order. Further, it is evident

> that compliance with that order would unduly prejudice the welfare of the appellant's children.
>
> The Magistrate was in error in making an order for compensation, having regard to the facts known to the Magistrate, which included that the appellant would be unable to comply with the order and, further, that compliance with the order would unduly prejudice the welfare of dependants of the appellant if he were required to make the payments.

In this instance, a suspended sentence and bond was substituted for the original sentence, although the order for compensation was upheld because the offender was now employed and able to pay.

The ability to pay is an important determinant, although the sum arrived at may be independent of other orders for confiscation of assets. *Mohid Jawad v The Queen* (2013) EWCA Crim 644 held that by requiring the offender repay the victim in addition to a confiscation order would require the double counting of moneys owed. However, it was held that such a sentence is not necessarily disproportionate unless it can be determined that the offender will indeed repay both sums. The court also took the opportunity to clarify that the nature of compensation ordered under s 130 of the 2000 Act is civil in character, despite its availability as an ancillary order in a criminal sentencing matter, at par [12]:

> A compensation order and a POCA [Proceeds of Crime Act] confiscation order are two very different things. They derive from quite separate statutes and they serve different purposes. The power to make a compensation order is now derived from section 130 Powers of Criminal Courts (Sentencing) Act 2000. Historically the power existed long before any proceeds of crime legislation and has not been modified as a result of it. A POCA confiscation order is designed to remove from the defendant the fruits of crime. A compensation order has a different purpose; it is designed as a limited and summary method of ordering the defendant to repay the loser and is available to short-circuit a civil action against the defendant in a straightforward case. Because the two orders serve different purposes, it has been held on several occasions in the past that there is no obstacle to making both orders in the same case.

The *Powers of Criminal Courts (Sentencing) Act 2000* (UK) ss 149–149 also provides for restitution of property where the offender is convicted

of a theft offence. The court may order that any person having control or possession of the goods stolen from the victim be restored to the victim or to any person entitled to them. This order may be made upon application by the victim or other person entitled to the goods. The restitution of goods under these sections extends to the recovery of goods that represent the stolen items. Thus, where an offender has sold or otherwise disposed of the goods the proceeds of that sale may be recoverable by the victim. The court may also order that the offender pay the victim or another person the equivalent amount of the value of the property stolen.

Victim Rights and the Political Protagonist: Policy Development and Legislative Reform

This section traces the issue of victim mobilisation in the development of compensation policy. As seen through the development of a retrospective claims policy in NSW, victim disquiet with changes to compensation arrangement and the perceived loss of entitlements post-2013 reforms demonstrate the power of the victim as a protagonist of political and legal change. The 2013 changes to victim compensation in NSW were heavily criticised by Community Legal Centres and the Woman's Legal Service NSW amongst others for restricting victim's access to compensation and for reducing lump sum payments to victims. Although the changes sought to benefit victims by providing payments for immediate needs following an offence, and for victims of domestic and family violence by providing for expense reimbursement regarding relocation in order to avoid further violence, the reduction of lump sum awards for recognition payments specifically disadvantaged those victims whose claims had not been determined by the time the new legislation took effect, out of the lack any transitional process allowing prior claims to be determined under the 1996 Act.

As a result of some victims whose injuries derived from the same criminal incident being granted lump sum compensation prior to the changes taking effect while other victims being determined under the more restrictive recognition payments scheme, the *Victims Rights and Support Amendment (Transitional Claims) Regulation 2015* (NSW) was introduced to provide for a period where prior claims could be processed

under the 1996 rules. Under the 2015 Regulation, victims whose claims had been made under the 1996 Act, before 7 May 2013, are eligible to have their application reassessed under the 1996 Act, from 1 September 2015 until 31 August 2016.

There was substantial outcry from individual victims upon commencement of the 2013 scheme and particular victims thought to be disadvantaged by the introduction of the new scheme were particularly outspoken. As the new scheme contained no transition period, with all prior claims being instantly considered under the new framework and system of reduced one off payments, some victims were seen to be especially disadvantaged where they had hoped for larger awards under the old system.

A *Sydney Morning Herald* article of 2 August 2015, following the introduction of the transitional provisions, indicates how the changes impacted certain victims who had experienced high level harm:

> A gang rape victim who went public on TV and with a change.org campaign after she received $15,000 when the government introduced retrospective changes to the Victim Compensation Scheme has now been told she can have her claim reassessed.
>
> Katrina Keshishian, whose sexual assault was regarded as the worst level, would have been entitled to a figure around $50,000 before the reforms but had to campaign to urge politicians to rethink the changes.
>
> …
>
> NSW Attorney General Gabrielle Upton today announced that victims caught in the transition between the old and new schemes could have their claims reassessed from September 1.
>
> 'The NSW government has listened to and acted on community concerns. We have kept our word and fast-tracked the delivery of this key election promise', Ms Upton said.

The changes also demonstrate how victims have sought to shape the compensation process as one that is owing to them. The restoration of rights owed to victims under the 1996 Act thus demonstrate the continued power of grassroots movements but also indicates the tension in the movement toward the rationales applied to victim compensation as a remedial framework. The movement toward victim self-responsibility for the claiming of individual and discrete expenses consequent upon them, dealing

with the costs of crime in particular ways, for instance, by leaving the site of violence against them in cases of domestic violence, have also been heavily criticised by victims and those representing victims, such as Community Legal Centres. The reliance on restitution as a means of recovering recognition payments by Victims Services has also been of concern, especially where it limits a victim's willingness to seek a recognition payment out of fear of reprisal should Victims Services seek restitution from the offender once the payment has been made to the victim (see McEwin 2014).

International Systems of Victim Compensation

This chapter now turns to consider the role of the partie civile in continental European systems of justice and the use of reparations in the ICC as a substantial but perhaps under-utilised mechanism of victim restoration.

The Partie Civile

Victims have the power to pursue a civil claim in the context of the continental European criminal trial. This process is otherwise referred to as an adhesive prosecution, because the civil claim is adhered to the state prosecution process of criminal trial that determines the main issue of the offender's liability to punishment. The court hearing the charges against the accused therefore also determines the victim's right to compensation and the award to follow.

The partie civile system of participation is found across numerous European jurisdictions. The French system, for example, invites the victim to provide the court with a statement proving particulars of the losses and injuries suffered by them that relate to the proceedings before the court (Brienen and Hoegen 2000: 319). The process for claiming civil damages follows the trial process such that the civil claim is heard following the presentation of arguments and evidence before the judges and lay jury. The juge d'instruction investigates the case and determines whether the matter should proceed to trial. Where a matter is not referred to trial,

the victim may apply for compensation from the state directly. However, where the matter is brought to trial, the victim may attach their civil claim to the trial process. Once the state case has been made against the accused, the victim is able to address the court via their counsel, followed by the prosecution and defence. While the judges and jury determine the guilt of the accused against the charges before the court, the lay jury is excluded from determining the civil claim, which falls to the judges themselves.

Although the victim may participate as partie civile from the commencement of trial proceedings, they are not able to present evidence on oath once granted that standing. Thus, where the testimony of the victim is required in the state prosecution, which must proceed on oath, the usual process is for the victim to seek standing as partie civile following the close of the state prosecution case. The victim is then free to make submissions and present additional evidence without taking an oath (Brienen and Hoegen 2000: 323). As a direct participant with standing before the court, the partie civile enjoys privileges, including being informed of key developments in the matters before the court, are able to challenge court decisions and are able to present additional evidence to the court, aside from either prosecution or defence.

Victims of individual or personal crimes can present a claim for civil damages by attaching a civil complaint at any time throughout the trial. Awards may be granted as reparation from the offender directly, or through a state fund, the Fonds de Garantie, available for victims of especially violent or serious crimes, in particular, gross trespass to the person such as homicide, serious interpersonal harm, and sexual assault. Victims of terrorism are also included. While there are no limits for serious forms of interpersonal violence or injuries caused by terrorism, compensation for minor offenses tend to be limited to treatment for injuries, together with associated costs. A victim may also make a claim to the Crime Victim Compensation Commission, or the Commission d'Indemnisation des Victimes d'Infractions, to have their claim assessed by a Commissioner who will examine the material and non-material damage caused to the victim. The non-material harms include psychological injuries, emotional trauma, as well as future losses that result from the offence.

The French system allows for direct party recognition and participation, although state support is also available where compensation is not

pursued at trial. Although compensation is provided for serious offences, including acts of terrorism, the French system does not support compensation for minor offences to any significant extent. However, the French system provides a means of court participation and standing for civil claimants whilst providing a means to recover compensation where in a given case standing as partie civile is either not possible or desirable.

Reparations and the International Criminal Court

The ICC may consider reparations against the offender or state following the determination of guilt in the trial phase. The court will consider reparation where victims have applied to participate in proceedings. The modes of redress for victims granted participatory rights before the ICC extend to orders for reparations for particular offenders, and the Trust Fund for Victims, which may be available as an alternative to court-ordered reparations (McCarthy 2012; Keller 2007).

The right to reparations is contained under art. 75(2) of the Rome Statute:

> The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
>
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

The Rules of Procedure and Evidence before the ICC indicate how victims are able to participate in proceedings.[5] For reparations, victims must make an application to the Victims Participation and Reparations Section of the ICC Registry. This application is then forwarded to the requisite Pre-Trial Chamber to determine whether the victims seeking to participate are indeed victims of the offences alleged, and whether their harms fall within the jurisdiction of the ICC. If their bona fides are established, the Pre-Trial Chamber will determine the mode of their participation, including the role of counsel. Where a large number of victims are present, the Registrar may ask victims to choose a representative, or where no representative is chosen, allocate counsel to represent a number of victims.

The determination of reparations and any allocation of compensation or restitution will be determined at the close of the trial regarding liability of the substantive offences. Once found guilty, the court will move to consider reparations and this will involve a greater level of victim participation. Evidence may be called and witnesses may be required to testify. New documentary evidence may also be tendered. Although reparations proceedings may follow determinations of guilt, they will draw from evidence tendered at trial regarding the harms and injuries sustained by victims, and may be included in the trial process to the extent that questions may be put to victims when giving their evidence as to the guilt of the accused, so as not to require victims to return to court to testify again. It may be difficult, however, to separate the questions that relate to liability from questions that relate to reparations, for the latter assumes liability and guilt, which may deny the accused's trial rights to due process for the former (McCarthy 2012; Keller 2007).

In the reparations decision in *Prosecutor v Lubanga* (ICC-01/04-01/06-2904, 7 August 2012, Decision Establishing the Principles and Procedures to be Applied to Reparations), the Trial Chamber I handed down its decision and in doing so supplied general guidelines for the determination of reparations. However, the Chamber did not limit the scope of reparations nor did it rule to whom reparations were specifically owed, or how they should be supplied. The Chamber gave principal responsibility for reparations to the Trust Fund for Victims. The Chamber ruled that a collective approach to the allocation of reparations may be more appropriate in instances of gross violations, where numerous victims may seek compensation or restitution, although individual reparations may be granted. In this case, the ICC ruled that funds should be allocated from the Trust Fund for Victims because the accused was indigent.

The main purpose of reparations was specified at par [179]:

> Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts. Furthermore, reparations can be directed at particular individuals, as well as contributing more broadly to the communities that were

> affected. Reparations in the present case must – to the extent achievable – relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities (without making Mr Lubanga's participation in this process mandatory).

The Chamber turned to restitution, compensation, and rehabilitation, and then turned to the relevance of an award for compensation and its funding, at par [269]:

> The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order.

The Chamber ruled that the accused's indigence must result in any compensation flowing from the Trust Fund for Victims. However, the reparations decision overall makes clear that reparations go well beyond financial compensation to victims. The welfare of victims is considered in the context of restoring their community and personal life, and 'should guarantee the development of the victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms' at par [213]. Although the Chamber cannot rule on any extended program that seeks to restore victims and cater for the ongoing developmental needs of victims, especially child victims, the Chamber is able to turn the determination of an appropriate award and allocation to particular victims over to the Trust Fund for Victims, while the Registry and Office of Public Counsel for Victims and partner organisations is able to follow through on the non-pecuniary measures to further assist victims. Although contrary to most court awards for compensation, which culminates in a dollar value ruling, the

institutional capacity of the ICC and its overarching statutory obligations regarding the needs and interests of victims allows the Chamber to utilise that institutional framework in order to support the various reparative acts that need to follow to ensure as many victims as possible benefit.

Reconsidering Victim Compensation as Welfare Intervention

The emergence of neo-liberal governance and the requirement that the victim cater for their own losses with some government assistance characterises the emergence of victim compensation schemes in the second decade of the twenty-first century. Although compensation is prolific, in that most jurisdictions have a scheme to cater for the financial needs of victims following their criminal injury, the substantive provisions of each scheme vary. Although compensations is provided for the benefit of victims and this moves from the state as a gesture of support to encourage the rehabilitation of the victim and enhance their well-being, changes to compensation policy within the common law jurisdictions considered in this chapter demonstrate a movement toward discrete payments that facilitate or support victims in pursuit of their own recovery.

Although the framework that manifests on the 2012 reforms to compensation in the UK, and the 2013 reforms in NSW, take their own path by relying on different tests and thresholds, several features suggest a movement away from the tortious notion of once and for all payments. The awards now provided under the UK scheme demonstrate a restricting of payments for less serious injuries, and the use of different payments to target expenses and costs. Although the UK scheme preserves the total cumulative award at £500,000, the method of assessment and the differentiation of payments between heads of loss or costs incurred means that smaller amounts may be granted to cater for individual expenses across numerous categories of loss, rather than one sum representing the total compensation. Although the UK scheme retains injury payments subject to a tariff informed by medical evidence and the severity of the injury incurred, the removal of bands

and the proportional payment of other bands, with only the most severe injuries being protected under the 2012 reforms, means that overall injury awards will be reduced for the majority of victims (see Miers 2014a: 270–271). Other heads of loss have individual requirements that limit the award owing to a victim in certain circumstances. Awards for loss of earnings will be reduced, for instance, where the victim is deemed not to have made their civil contribution by being employed for a specified period. Special expenses will only be paid where specific costs are incurred regarding ongoing medical or associated expenses, and awards will be reduced to take into account social security benefits that relate to the victim's special expenses. Disabled victims are therefore likely to have this head of loss reduced in accordance with existing payments.

The additional tests required of the UK scheme, that the victim be innocent and not have contributed to their injury, or taken risks to have compromised their standing as an innocent, blameless victim, also demonstrate a shift in policy. The blameless victim must also assist law enforcement authorities and been willing to take all reasonable steps to assist the claims officer in the administration of their claim. An award may be withheld or reduced because of the applicant's character, or where the victim has unspent convictions. Their award may be rejected altogether should they have prior convictions, as provided under cl. 3 of Annex D. An award with regard to a fatal criminal act may be withheld or reduced if the deceased's conduct before, during, or after the incident that caused death makes it inappropriate to grant the award, either partially or fully.

The shift in policy evidenced by the 2012 reforms to criminal injuries compensation in the UK are founded on the basis that the availability of small amounts of compensation following the offence may not necessarily assist a victim's recovery (Home Office 2005). Rather, such victims should turn to service providers to assist with their immediate needs, leaving compensation for those victims who experience serious injuries that result from a crime. The Home Office (2005: 17) has recognised this position for some time, undoubtedly reforming criminal injuries compensation in line with its findings that compensation ought to be available to deserving victims of serious violence:

> We believe that many victims of less serious offences need early, practical support, such as help with improving their personal safety or dealing with insurance claims, rather than relatively small amounts of financial compensation from the state which arrive long after the crime. And the victims of more serious offences need suitable compensation settlements to help to ensure that their long-term needs are covered.

While NSW has adopted a similar approach with regard to access to services immediately following the offence, a different approach has been taken to the availability of smaller payments for immediate needs. Compensation in NSW is now characterised by access to counselling and payments for immediate needs, with financial assistance for economic loss and a recognition payment as compensation that potentially follows this initial access to support. The UK and NSW schemes differ with regard to immediate payments, with a preference for lump sums, although the UK scheme does allow for the possibility of interim payments should a claims assessor determine that discrete payments are necessary. The NSW scheme follows the UK policy trend of reducing payments and directing victims to service providers for immediate support, although it includes this within its compensation framework, as opposed to the current UK scheme, which provides immediate assistance within a broader policy and service context beyond victims' compensation law.

What is clear in the recent reforms to both UK and NSW compensation schemes is the use of victims' compensation as a mechanism for the delivery of broader criminal justice policies. These policies focus on the self in new ways, and encourage victims to participate as good citizens by seeking services that accommodate for their rehabilitation and recovery, rather than seeking out lump sum compensation. Where more substantial awards are required because of the seriousness of the injury incurred, the victim must present as a deserving citizen that meets a range of criminal justice priorities or otherwise risk access to a full award.

Notes

1. Also see Ministry of Justice (2011) *Breaking the Cycle: Government Response*, UK Government.
2. Paul Lynch, *Hansard*, Legislative Assembly, NSW Parliament, 20527: 'The Opposition opposes this Bill. It is bad in principle and in practice. It

represents the triumph of unfeeling Treasury bureaucrats over the real and all too human needs of victims of crime.'

3. See *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 130(3): 'A court shall give reasons, on passing sentence, if it does not make a compensation order in a case where this section empowers it to do so'; *Criminal Law (Sentencing) Act 1988* (SA) s 53(2A) '…the court must, if it does not make an order for compensation, give its reasons for not doing so.'
4. New Zealand also provides similar restrictions to compensation upon sentencing under the *Sentencing Act 2002* (NZ) s 12(1), 'If a court is lawfully entitled under Part 2 to impose a sentence or order of reparation, it must impose it unless it is satisfied that the sentence or order would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate.'
5. See Rule 16 of the Rules of Procedure and Evidence ICC: 'In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules: (a) Providing notice or notification to victims or their legal representatives; (b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91; (c) Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91; (d) Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.'

8

Extra-Curial Rights, Declarations and the Rise of the Commissioner of Victim Rights

Differential Rights and the Relocation of the Victim

The relocation of the victim in common law systems of justice has occurred through various reforms to the law and policy process. The provision of differential rights across service, participatory, and enforceable or substantive rights has been largely facilitated by the introduction of charters or declarations of rights that set out these rights. The provision of rights through a charter or declaration is designed to meet the 1985 PJVC and other international instruments considered in Chap. 1. However, these documents are an innovative policy approach to the recognition of victims that implies a compromise in the context of the normative assumptions inherent in the adversarial criminal trial. This compromise is the allocation of rights for victims in a system of justice where to talk of victim rights appears antithetical to the normative assumptions of adversarial justice. These assumptions talk of the rights

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of the defendant, the state, and the courts, and the agents who work for and within them—lawyers, the police, the prosecution, and the judiciary. To talk of victim rights in a system that denies the standing of the victim as a party participant is contradictory and controversial. The answer is to house victim rights in such a way as to render them compatible, or perhaps tolerable, with a system that identifies the victim as beyond the normative scope of the criminal trial.

Providing the victim with a set of declared rights must thus be carefully managed in a policy and legal context because such rights will be taken as detracting from the rights, duties, and powers of those normative stakeholders that comprise the adversarial system. The development of different types of rights and an institutional apparatus through which to contain and express such rights is of strategic importance to the stability of the adversarial system. Alternatively, the carefully managed integration of the victim through the provision of different rights that work at different levels of justice is a strategic response to the difficult task of granting the victim some standing in a justice system that identifies the status of the victim as ambiguous at best. The rise of charters and declarations and the institutional environment of the Office of the Commissioners of Victim Rights is thus an important developmental achievement in a system that places victim interests outside the adversarial common law context. The slow modification of this office to afford victims increasing levels of participatory and substantive rights that connect with common law processes results from the need to stage the integration of the victim back into common law courts. Despite the movement toward more enforceable rights and perhaps better coordination between the Office of Commissioner and offices within the criminal justice system, declaratory and charter of rights are still considered illusionary, given that such rights do not grant the victim independent standing in court or in the justice system generally.

This chapter traces the rise of charters or declarations of rights as a unique offering for victims at a time when the place of the victim in adversarial system of justice is contested and challenged. Although disquiet remains, charters and declarations are now identified as an important mode of setting out fundamental rights to treatment and of shaping

the cultural and professional practices regarding the engagement of the victim by justice agencies. The common theme amongst charters and declarations is that they apply to all persons involved in the administration of the affairs of the state, including police and prosecutions, as well as NGOs in agency agreement with the state. Judicial officers are, however, excluded. Charters and declarations of rights are thus particularly useful at effecting cultural change and of mandating policy development to better integrate the victim into service provision (see generally O'Connell 2015; Holder 2015). Over time, however, the amendment of charters and declarations has allowed for the expansion of core rights to provide for better and more respectful treatment of victims and to include clauses that allow for greater participatory rights to influence substantive outcomes in the prosecution decision-making process.

The amendment of charters of rights and associated powers for Commissioners of Victim Rights to allow for or protect victim participation and to enable the enforcement of key substantive rights demonstrates the maturing of the Office of Commissioner. While not all jurisdictions demonstrate the same growth and development of the Office of Commissioner, the general tendency is toward the expansion of the role of the Commissioner, and consolidation of powers that regard the welfare of the victim as administered within their department. While most Commissioners have the duty to maintain the charter or declaration constitutive of their office or jurisdiction, which may include determining compensation claims and access to victim assistance more generally, others have closer alignment with policing and prosecution functions, and ultimately the courts in the determination of criminal matters. Commissioners have different levels of independence from government, and thus variable power to influence important law reform processes with a view to the development of enforceable or substantive rights that grant the victim actual standing in the justice system. A comparison between the Office of Commissioner in England and Wales, against the NSW and South Australian experience, demonstrates different stages of the development of the office, but also how this office has become an important adjunct to the rights of victims in the criminal trial.

Adjunctive and Extra-Curial Rights

In England and Wales, the Victims' Code was first introduced on 3 April 2006 in order to establish minimum standards of service that victims ought to enjoy from criminal justice agencies. The first iteration of the Victims' Code sought to provide victims with rights to information about their case during all phases of the criminal trial process. The Victims' Code was revised in 2013 as part of the Government's attempt to transform criminal justice policy. The 2013 Victims' Code attempts to bring detail to the policy initiative of putting victims first, by encouraging more agile management of victim issues and an openness to reform where changes need to be brought. The new Victims' Code was made available on 29 October 2013 and took effect on 10 December 2013. *Domestic Violence, Crime and Victims Act 2004* (UK) currently provides for the Victims' Code and constitutes the Office of the Commissioner for Witnesses and Victims, otherwise known as the Victims' Commissioner.

The development of a charter of rights in NSW dates back to 1989 with the first iteration being developed by the Victims of Crime Assistance League (see O'Connell 2015: 249). The Charter of Rights for Victims of Crime was introduced into the NSW parliament in the *Victims Rights Bill 1996* (NSW) and sought to introduce for the first time a declaration of basic rights for victims in the NSW criminal justice system. The Explanatory Notes accompanying the Bill set out the core objects of the charter and its relationship to the function of the government and connected agencies:

> Clause 7 provides that the Charter is to govern, as far as practicable and appropriate, the treatment of victims of crime in the administration of the affairs of the State. Agencies and officials are required to have regard to the Charter to the extent that it is relevant and practicable to do so.
>
> Clause 8 provides that legal rights are not created or affected by the Charter, but provides that breaches of the Charter can be the subject of disciplinary proceedings against officials and complaints to the proposed Victims of Crime Bureau.

The Office of Commissioner of Victims' Rights was introduced in 2013 under reforms to victims' compensation and assistance pursuant to the

Victims' Rights and Support Act 2013 (NSW). Brad Hazzard read the Bill a second time on behalf of the then Attorney-General of NSW, Greg Smith:

> The charter of rights for victims of crime will be transferred into the Bill from the Victims Rights Act 1996 along with the provisions establishing the Victims Advisory Board. In addition, the Bill will fulfil one of the Government's commitments under 'New South Wales 2021: A plan to make New South Wales number one' by establishing a Commissioner of Victims Rights. The commissioner will be appointed as the head of victims services in the Department of Attorney General and Justice, will oversee the Victims Support Scheme and will otherwise assist victims of crime in exercising their rights.
>
> The commissioner will promote and oversee the implementation of the charter of victims' rights to help Government and non-government agencies to improve their compliance with the charter and receive complaints about breaches. When complaints cannot be resolved, the commissioner will be able to recommend that agencies apologise to victims of crime and provide me with a report to present to this House. (Brad Hazzard, *Hansard*, Legislative Assembly of NSW, 7 May 2013, 20068)

In South Australia, the 'Declaration of Principles Governing the Treatment of Victims in the Criminal Justice System' was introduced by the *Victims of Crime Act 2001* (SA). This legislation sought to enact the already recognised declaration of rights that was in force in South Australia, having been introduced in 1985 by cabinet direction. Reviewing the laws relating to victim rights, the then Attorney-General of South Australia, Kenneth Trevor Griffin, announced in an address to parliament an intention to enshrine the declaration in legislation:

> In 1985 the then Attorney-General, the Hon. Chris Sumner, presented the Declaration of Rights for Victims of Crime to the parliament. It was promulgated as a cabinet direction which required government agencies to honour victims' rights. The states' declaration encapsulated the majority of the principles in the United Nations declaration of basic principles of justice for victims of crime and abuse of power, which was also adopted in 1985. The states' declaration has formed the basis of comparative declarations or charters of victims' rights elsewhere in Australia.

> Report 1 on the review reported that the declaration of rights for victims of crime had brought about considerable improvements for victims of crime in our state. However, the impetus has waned and there is an obvious need to encourage greater commitment to victims' rights. The report highlighted that a number of victims' rights are already enshrined in legislation. Some examples include the victim's right to have his or her safety concerns taken into account during bail hearings and the right to make a victim impact statement. A comprehensive list is given in the report. Although many significant victims' rights are already recognised in law, there is support for the declaration of rights for victims of crime to be enshrined in legislation. (Attorney-General Griffin, *Hansard*, Legislative Assembly of SA, 9 December 2000, 869–870)

The South Australian Office of Victims of Crime Coordinator was introduced in 2001 by the *Victims of Crime Act 2001* (SA). This office was renamed the Commissioner for Victims' Rights in 2007, following passage of the *Victims of Crime (Commissioner for Victims' Rights) Amendment Act 2007* (SA).

An Enforceable Charter of Rights?

The road to an enforceable charter of rights for victims has been long and convoluted. This history is material to understanding the nature of victim rights and their identification as an affront to the criminal trial, as a long-standing institution of procedural fairness and due process for the testing of accusations of wrongdoing levelled against offenders by the state. The general momentum of the development of a rights framework was a compromise of service rights with some procedural rights granting the victim access to fair treatment and information. Increasingly, these rights are now framed in the context of substantive powers for victims, providing victims with the power to demand information and to be consulted as to key decisions reached.

The path to enforcement is uneven between the jurisdictions covered in this chapter. England and Wales retains a wholly unenforceable charter, while New South Wales has moved toward enforcement, despite the lack

of a clear mechanism for enforcement in the Office of Commissioner, where the possibility of judicial review is expressly excluded. South Australia provides various rights to consultation and although this does not give the victim standing in a criminal or civil matter, nor allow victims to alter the course of criminal proceedings, victims are granted representational rights that provide important access to decision-making processes of the prosecution regarding charge decisions and appeals.

The Road to Enforcement

Charters or Codes of Victim Rights soon came to be ratified on a domestic basis following the 1985 PJVC. In England and Wales, the *Domestic Violence, Crime and Victims Act 2004* (UK) creates the Office of the Commissioner for Witnesses and Victims, otherwise known as the Victims' Commissioner. The powers of the Victims' Commissioner are contained under s 48 and can be summarised as promoting the interests of victims and witnesses; encouraging good practice in the treatment of victims and witnesses; and reviewing the Victims' Code. The Victim's Code is made pursuant to s 32 of the 2014 Act. It does not extend to judicial officers or to officers of the CPS when exercising duties involving discretion. Further, s 51 provides that the Victims' Commissioner is unable to represent a particular victim or witness, bring individual proceedings in court, or do anything otherwise performed by a judicial officer. The legislation also provides that there be no legal cause for action where a provision of the Victims' Code has not been performed or maintained. The Victims' Code covers a victim's right to respectful treatment, to information to be kept updated as to key developments regarding arrest, court dates, sentencing outcomes, and when leave to appeal is granted. Witness Care Units have been established to ensure that victims gain access to the advice and information sought.

Although the Victim's Code is not enforceable and the Victims' Commissioner has no direct power of enforcement or individual representation, s 34(2) may affect the tenure or veracity of evidence in court, or the standards expected of an officer of the Crown in the discharge of their duties. The subsection provides that 'the code is admissible

in evidence in criminal or civil proceedings and a court may take into account a failure to comply with the code in determining a question in the proceedings'. While the connection between the Victims' Code and the tenure of evidence in a criminal matter is tenuous, the requirement to cater for the needs of the victim, including their right to be kept informed, may be at issue where a failure to keep a victim informed leads to direct harm. This may occur where an offender harms a victim following release or escape, where the victim has previously sought to be kept informed as to all offender movements. This would most likely raise a civil rather than criminal liability. The rights provided under the Victims' Code, therefore, are firmly located as service rights. Some progression toward participatory rights may be evidenced when you see a requirement to keep victims informed or to provide types of court support, but this does not create a legal expectation that the victim gains a mode of participation in court.

The Office of the Commissioner of Victims' Rights in NSW is prescribed under Pt 3 of the *Victims' Rights and Support Act 2013* (NSW) but was developed out of the former Office of the Director of Victims Services and thus is required to co-ordinate the Department of Victims Services, NSW, as well as enforce, to the extent permitted, those aspects of the 2013 Act that afford victims some degree of redress in the NSW justice system. Specifically, the Commissioner must oversee support services for victims (as well as family of missing persons), promote and oversee the implementation of the charter, to make recommendations to assist agencies improve their compliance with the charter, receive complaints from victims of crime (and family members of missing persons) about alleged breaches of the charter, recommend that agencies apologise to victims of crime for breaches of the charter, and must determine applications for compensation and support for victims and prescribed family members. Part 2 provides the charter and prescribes that it is to be implemented by those officials, other than judicial officers, who administer the affairs of the state. This includes those involved in the administration of justice, the police, persons involved in the administration of any department of the state, in addition to any agency funded by the state that provides services to victims. Section 11 allows the Commissioner to make inquiries and undertake investigations as the Commissioner considers necessary. This is a broadly stated power and the extent to which it may extend to

victims, and the representation of individual victims either personally or by counsel, is unknown. Section 12 provides the Commissioner with the power to compel the production of information from any government agency including those working within an agency agreement, such as private service providers. This power can be used to compel production of information relevant to a determination of the breach of the charter or where information is required for a determination of victim assistance under the legislation. It is an offence to provide false or misleading information. Although the exact status and reach of the powers of the Commissioner are at present untested and unknown, they may be used to compel adhesion to the charter with regard to access to information, representation, support, and compensation. As some of these services are delivered by Victims Services and given that the Commissioner consults widely with government and service agencies, it is anticipated that the powers of the Commissioner to investigate and compel production may only need to be used on rare occasions, if at all.

The Office of the Commissioner for Victims' Rights in South Australia provides for a broader basis for substantive rights. Section 16A of the *Victims of Crime Act 2001* (SA) allows the Commissioner to represent an individual victim where they complain that a right afforded to them under Pt 2 has not been maintained or upheld. This section prescribes that the remedy is limited to a written apology to the victim from the infracting party. However, s 32A allows the victim to appoint a representative to exercise their rights under Pt 2. Representation may include an officer of a court, the Commissioner, or a person acting on behalf of the Commissioner, an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime, a relative of the victim, or another person who, in the opinion of the Commissioner, would be suitable to act as an appropriate representative. It is this section that allows the victim to seek counsel, from the Commissioner himself or a personal representative or lawyer. However, such representation may be necessary where certain rights under Pt 2 have not been extended to the victim or where the Crown has neglected to consult with the victim as required under s 9A. Other rights that provide the victim substantive access to justice processes includes s 10A, which provides that a victim who is dissatisfied with a determination

with regard to any criminal proceeding, and one where the prosecution ordinarily exercises a right of appeal, may ask the prosecution to appeal the determination made. Due consideration must be given to the victim's request by the prosecution. While this does not grant victims the right to appeal in person, it does provide for a right to consultation and to make submissions to the prosecution as to why the right to appeal ought to be exercised.

Delimiting Victim Rights

The general limit placed on charters or declarations of rights was outlined by the Attorney-General of South Australia prior to the introduction of the *Victims of Crime Act 2001* (SA) that provided a legislative platform for the declaration of victim rights in South Australia:

> Care will be taken to ensure that the state is not open to litigation by disgruntled victims who allege that their rights have not been honoured by public officials. Other jurisdictions have overcome this problem by making it clear that victims' rights in law are not mandatory rights but rather principles of justice or guidelines. (Attorney-General Griffin, *Hansard*, Legislative Assembly of South Australia, 9 December 2000, 870)

The non-enforceable basis for the provision of victim rights is a testament to the victim's extra-curial status in the criminal justice system. As victims have no rights in adversarial systems of justice, the provision of a schedule of rights was and to an extent still is identified by justice stakeholders as the meting out of a political prerogative over the independence of law. The compromise was the inclusion of a section in the legislation enacting the charter or declaration that the rights declared could not be actioned or enforced in court. Although some jurisdictions are moving toward enforceable charter rights, the savings provision is still contained in the UK legislation. South Australia has now moved away from the strict non-enforceability of victim rights, by providing victims representational rights provided under the declaration since 2009 following amendment of the 2001 Act by the *Statutes Amendment (Victims of Crime) Act 2009* (SA). However, the 2001 Act still contains a non-

enforcement provision under s 5 in that the rights provided do not grant the victim a right enforceable in criminal or civil proceedings. While s 5 further limits the victim's ability to seek damages or otherwise alter the course of criminal proceedings, the section requires that 'public agencies and officials are authorised and required to have regard, and to give effect, to the principles so far as it is practicable to do so having regard to the other obligations binding on them'.

However, s 32A of the 2001 Act now provides a right to substantive participation:

> s 32A Victim may exercise rights through an appropriate representative
>
> (1) Rights granted to a victim under this, or any other, Act may be exercised on behalf of the victim by an appropriate representative chosen by the victim for that purpose.
>
> Note: Such rights would include (without limitation) the right to request information under this or any other Act, the right to make a claim for compensation under this or any other Act, and the right to furnish a victim impact statement under the Criminal Law (Sentencing) Act 1988.
>
> (2) This section does not apply to rights, or rights of a kind, prescribed by the regulations.
>
> (3) In this section:
>
> 'appropriate representative', in relation to a victim, means any of the following:
>
> (a) an officer of the court;
> (b) the Commissioner for Victims' Rights or a person acting on behalf of the Commissioner for Victims' Rights;
> (c) an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime;
> (d) a relative of the victim;
> (e) another person who, in the opinion of the Commissioner for Victims' Rights, would be suitable to act as an appropriate representative.

In NSW, changes made to the charter under the *Victims' Rights and Support Act 2013* (NSW) moves NSW closer to a framework of

enforceable rights, although not specifically at the behest of the victim. This includes the power of the Commissioner to compel production of information relevant to a dispute. While this power may be envisaged as assisting determinations for compensation, where facts needed for resolution are withheld and need to be produced, the power may be used regarding any dispute under the charter. This may include allegations of poor treatment by government officials or agents, or NGO officials bound by the charter. The charter also refers to key powers to confer with the prosecution regarding decisions made during the prosecution process. These powers as they relate to sentencing were covered in Chap. 2 regarding plea-bargaining, with the s 35A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), providing the victim's right to consult is consistent with cl. 6.5(2) of the NSW charter. While s 114 of the *Victims' Rights and Support Act 2013* (NSW) limits the liability of the Commissioner of Victims' Rights and her staff, few other limits are placed on the rights specified in the Act other than by cl. 19 of sch. 2:

> sch. 2 - cl. 19 Legal rights not affected
>
> (1) Nothing in Part 2 of this Act gives rise to, or can be taken into account in, any civil cause of action.
>
> (2) Without limiting subclause (1), nothing in that Part:
>
> (a) operates to create in any person any legal rights not in existence before the enactment of Part 2 of the Victims Rights Act 1996, or
> (b) affects the validity, or provides grounds for review, of any judicial or administrative act or omission.
>
> (3) However, this clause does not prevent a contravention of Part 2 of this Act from being the subject of disciplinary proceedings against an official or a complaint to the Commissioner under section 10.

Although the rights provided under the charter are generally not identified as enforceable by explicit reference to a means of enforcement (cf. right to substantive participation in s 32A of the 2001 Act in South Australia), and no limits on the victim capacity to join criminal actions are specified, the previous restriction on civil actions arising out of a breach of the charter have been carried over to the 2013 Act. This provision also

limits administrative actions that would otherwise allow that rights be enforced, where, for example, rights to consultation are denied under charter cl. 6.5(2). However, the operation of cl. 19(3) of sch. 2 as a mechanism to advance the rights of the victim under the jurisdiction of the Commissioner has not been tested in the context of a request to set aside an administrative decision on the basis of a denial of one or more of the charter rights. Without direct access to judicial review of an administrative decision, it is unlikely that a victim or Commissioner will be able to enforce a right in the charter where owed by another state office, other than extracting an apology for the victim. The Commissioner appears to have limited power over state agencies such as the prosecution. One exception may be service level rights and other rights that grant access to information. The US experience under the USC, discussed in the concluding section of this chapter, may provide some guidance.

In England and Wales, a failure to abide by the charter does not of itself give rise to criminal or civil proceedings pursuant to s 34(1) of the *Domestic Violence, Crime and Victims Act 2004* (UK). While England and Wales retains the general provision that the charter is not actionable in court the Commissioner is empowered by legislation to resolve disputes arising under the charter.

Commissioners of Victim Rights

Each of the Commissioners of Victim Rights has a statutory remit that creates their office. This remit includes powers that may be exercised by virtue of their office. This section traces key powers that constitute the role of the Commissioner in England and Wales, NSW, and South Australia, including their independence from government and parliament.

Commissioners of Victim Rights have a public role of promoting an interest in victim rights and raising the public's consciousness as to the plight of victims and the needs of discrete groups. However, the functions of offence go beyond this to liaise with other government agencies, to represent victim interests if not particular victims, and to resolve disputes that arise under the governing charter or declaration. Relevant too is the extent to which each office is independent from the executive.

This is particularly important where the Commissioner exercises a review and dispute resolution function, which may include making adverse findings against other public officials with the potential to embarrass state departments of even the government as a whole.

General Functions of Office

In England and Wales, the functions of the Commissioner are provided under s 49 of the *Domestic Violence, Crime and Victims Act 2004* (UK). These include:

s 49 General functions of Commissioner

(1) The Commissioner must:

  (a) promote the interests of victims and witnesses;
  (b) take such steps as he considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses;
  (c) keep under review the operation of the code of practice issued under section 32.

(2) The Commissioner may, for any purpose connected with the performance of his duties under subsection (1):

  (a) make proposals to the Secretary of State for amending the code (at the request of the Secretary of State or on his own initiative);
  (b) make a report to the Secretary of State;
  (c) make recommendations to an authority within his remit;
  (d) undertake or arrange for or support (financially or otherwise) the carrying out of research;
  (e) consult any person he thinks appropriate.

(3) If the Commissioner makes a report to the Secretary of State under subsection (2)(b):

  (a) the Commissioner must send a copy of the report to the Attorney General and the Lord Chancellor;
  (b) the Secretary of State must lay a copy of the report before Parliament and arrange for the report to be published.

In NSW, the Commissioner's functions of office are provided under s 9 of the *Victims' Rights and Support Act 2013* (NSW), as follows:

s 9 Functions generally of Commissioner

(1) The Commissioner has and may exercise such functions as are conferred or imposed on the Commissioner by or under this or any other Act.

(2) The Commissioner may delegate the exercise of any function of the Commissioner (other than this power of delegation) to the following:

(a) any member of staff referred to in section 8,
(b) any person of a class prescribed by the regulations.

Section 10 further provides for the Commissioner's functions in NSW:

s 10 Functions of Commissioner

(1) The Commissioner has the following functions:

(a) to provide information to victims of crime (and members of the immediate family of missing persons) about support services and assistance for victims of crime and such persons, and to assist victims of crime in the exercise of their rights,
(b) to co-ordinate the delivery of support services for victims of crime and members of the immediate family of missing persons and to encourage the effective and efficient delivery of those services,
(c) to promote and oversee the implementation of the Charter of Victims Rights, including by publishing codes, guidelines, and other practical guidance on the implementation of the Charter,
(d) to make recommendations to assist agencies to improve their compliance with the Charter of Victims Rights, including but not limited to conducting training and recommending changes to policies and procedures,
(e) to receive complaints from victims of crime (and members of the immediate family of missing persons) about alleged breaches of the Charter of Victims Rights and to use the Commissioner's best endeavours to resolve the complaints,
(f) to recommend that agencies apologise to victims of crime for breaches of the Charter of Victims Rights,

(g) to conduct, promote and monitor training, public awareness activities and research on victims of crime,
(h) to conduct reviews and inquiries, or both, on issues relating to victims of crime at the request of the Attorney General,
(i) to consider and determine applications under this Act for victims support.

(2) This section does not affect the exercise of functions of the Director-General under the Public Sector Employment and Management Act 2002 with respect to the Commissioner.

In South Australia, s 16(3) of the *Victims of Crime Act 2001* (SA) provides the Commissioner's functions of office:

s 16(3) Commissioner for Victims' Rights

(3) The Commissioner has the following functions:

(a) to marshal available government resources so they can be applied for the benefit of victims in the most efficient and effective way;
(b) to assist victims in their dealings with prosecution authorities and other government agencies;
(c) to monitor and review the effect of the law and of court practices and procedures on victims;
(d) to carry out other functions related to the objects of this Act assigned by the Attorney-General;
(e) if another Act authorises or requires the Commissioner to make submissions in any proceedings—to make such submissions (either personally or through counsel);
(f) to carry out any other functions assigned under other Acts.

Section 16A provides further powers and the Commissioner's ability to advocate on behalf of the victim and to seek an apology where the victim has been denied treatment or participation owed to them under the declaration:

s 16A Powers of the Commissioner

(1) A public agency or official must, if requested to do so by the Commissioner, consult with the Commissioner regarding steps that may be taken by the agency or official to further the interests of:

(a) victims in general; or
(b) a particular victim or class of victim.

(2) If, after consultation with a public agency or official, the Commissioner is satisfied that the public agency or official:

(a) has failed to comply with the requirements of Part 2 in circumstances where such compliance would have been practicable; and
(b) has not apologised or otherwise dealt with the victim in relation to the failure in a satisfactory way, the Commissioner may, by notice in writing to the public agency or official, recommend that the agency or official issue a written apology to the relevant victim.

(3) The Commissioner must provide the relevant victim with a copy of the notice given under subsection (2).

(4) The Commissioner must, in his or her report under section 16F, specify the number of notices given by the Commissioner under subsection (2), and the public agencies or officials to whom the notices were given, during the year to which the report relates.

(5) The Commissioner must, in exercising his or her powers in relation to a particular victim, have regard to the wishes of that victim.

The general functions of the office set out the scope of the office as one that has been designed to assist victims in the context of established justice systems. This means that the functions of the office are usually crafted to work alongside those offices already constitutive of the criminal justice system of each state. Apart from promoting the general interests of victims and reporting to government those opportunities for reform to better support victims, the office of Commissioner generally contains a compliance function with associated powers to meet with and seek information from other public officials charged with a duty to maintain the rights of the charter. These tend to be service delivery agencies that work with victims.

Independence of the Commissioner

The independence of the Commissioner of each jurisdiction has been identified as fundamental to the functions of office. Although the

Commissioner may provide a bridge between victims and the offices of the state, and would seek to do so in an amicable way that overcomes the division and isolation potentially felt by the victim, issues may arise where the Commissioner is divided between the interests of the victim and those of the state or offender. The Office of Commissioner has thus been criticised out of a lack of independence where difficulties arise that require the Commissioner to take a more critical stand against state policies that do not work in the victim's favour, or more significantly, disadvantage the victim in criminal justice processes.

The three Offices covered in this chapter demonstrate different levels of independence. The Victims' Commissioner in England and Wales enjoys a statutory guarantee of independence from the government or state. Section 48 of the *Domestic Violence, Crime and Victims Act 2004* (UK) guarantees this independence, both by establishing the Office of Commissioner as a corporation sole, as an entity that survives any one appointment, and by providing for independence from the Crown:

> s 48 Commissioner for Victims and Witnesses
>
> (3) The Commissioner is a corporation sole.
>
> (4) The Commissioner is not to be regarded:
>
> (a) as the servant or agent of the Crown, or
> (b) as enjoying any status, immunity or privilege of the Crown.
>
> (5) The Commissioner's property is not to be regarded as property of, or held on behalf of, the Crown.

The Victims' Commissioner's independence is further guaranteed by restricting her capacity to exercise powers that may be exercised by any one particular victim, and by acting on the instructions of a judicial officer under s 51 of the 2004 Act.

The Commissioner for Victims' Rights in South Australia also enjoys rights of independence from government. Section 16E of the *Victims of Crime Act 2001* (SA) provides this right as follows:

> s 16E Independence of Commissioner

(1) Subject to this section, the Commissioner is entirely independent of direction or control by the Crown or any Minister or officer of the Crown.

(2) The Attorney-General may, after consultation with the Commissioner, give directions and furnish guidelines to the Commissioner in relation to the carrying out of his or her functions.

(3) Directions or guidelines under this section:

(a) must, as soon as practicable after they have been given, be published in the Gazette; and
(b) must, within 6 sitting days after they have been given, be laid before each House of Parliament.

The independence of the Commissioner in South Australia is arguably enhanced by virtue of s 32A of the 2001 Act. This section grants representational powers for victims and this extends to the Commissioner himself, where a victim elects to proceed with an inquiry or complaint under the Act. The Commissioner's ability to advocate for the victim in this regard whilst being independent from the state policing and prosecuting authorities to which the inquiries or complaints may be directed enhances the office as one that may intervene to represent the interests of victims in discrete matters. While the Commissioner may not be regarded as independent from the cause being represented if intervention on behalf of a victim was undertaken, the Commissioner's independence from the Crown or state would potentially enhance the benefit of victims.

An issue arises regarding the independence of the Commissioner of Victims' Rights in NSW. The Commissioner in this jurisdiction lacks any statutory reference to independence as found in England and Wales and South Australia. Section 8(1) of the *Victims' Rights and Support Act 2013* (NSW) provides the relevant employment context of the Commissioner and her staff, specifically, that 'A Commissioner of Victims Rights and such other staff as are necessary for the purposes of this Act are to be employed under Chapter 1A of the Public Sector Employment and Management Act 2002'. The employment of the Commissioner as a member of the NSW public service means that there is no independence from the government or Crown, or the departments of the state. This is of issue where a complaint is made under the 2013 Act. Although the

Commissioner is granted power to resolve disputes as arising under the Act, a lack of independence is likely to be at issue where a complaint under the charter is made against a public official. McEwin (2014) notes this as a substantial issue and limitation of the Office as currently constituted, compounded by the fact that the Commissioner in NSW also oversees Victims Services, which determines compensation outcomes for victims. Where a complaint is made against a compensation outcome it would therefore fall to the Commissioner to make a determination against her own department.

Illusory Rights and the Durability of the Victim's Power to Compel

The use of charters and declarations of rights has absolved the need to further integrate victims into criminal proceedings by provision of a set of rights that, despite utilising the language and discourse of rights, appears illusory. They are illusory because such rights are generally limited to service level rights with some degree of substantive participation provided. In limited and strictly controlled ways, some enforceable rights of a substantive character are now being provided. However, these substantive provisions rely on the good intentions of those officials concerned with the administration of the affairs of the state. There is no general right of standing in criminal proceedings and the individual clauses contained in the charters or declarations of rights may otherwise only give rise to complaints resolution without access to any civil remedies. Administrative action in NSW is expressly excluded under cl. 19 of sch. 2 of the *Victims' Rights and Support Act 2013* (NSW), although this seems also to be precluded in England and Wales and South Australia by excluding criminal or civil action, save in the unlikely event where a court interprets an administrative action as outside limits placed on civil action.[1]

The status of the charter and declaration of rights is increasingly ambiguous as rights to substantive participation are included that seem to conflict with the non-enforcement provisions contained in the legislation. The right to consult, for instance, which requires the prosecution

act bona fide and in good faith toward submissions that the victim may make regarding the charges brought, decisions to amend charges that include plea-deals, or decisions not to proceed with a charge, may be subject to administrative enforcement. Litigation under the *Crime Victim Rights Act 2004* (US) may be instructive here.

In the USA, the 2004 Act amended the USC by repealing the non-enforceable charter, replacing it with a set of enforceable rights under 18 USC § 3771. The charter now provides the following rights:

18 USC § 3771 Crime Victims' Rights

(a) Rights of Crime Victims – A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy

Litigation has ensued where the right to confer with the attorney has not been granted to victims. Victims in federal cases now enjoy the right to seek relief where they are denied their conferral rights provided under § 3771(a)(5). Relief by way of writ of mandamus seeking that the original decision be quashed with an order that the decision be made according to law, that is, by conferring with victims in the matter concerned, is stated under 18 USC § 3771(c)(3):

18 USC § 3771(c)(3) Motion for Relief By Writ of Mandamus

> The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

The case of *In re Dean* (2008) 527 F 3d 39 is widely cited as authority where relief is sought by way of mandamus. This order will be granted where the victim has been denied a right under § 3771 and where certain conditions are met that warrant the granting of the writ (see Beloof 2005). This includes situations where the petitioner has no other adequate means to attain relief, where the petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable, and where the issuing court, in the exercise of its discretion, is satisfied that the writ is appropriate in the circumstances. The grant of mandamus is thus seen as an extraordinary remedy to be granted in compelling circumstances. However, the Circuit Courts of Appeal do have a record of intervention where the rights of the victim have been denied under the 2004 Act.

Court of Appeals for the Fifth Circuit in *Re: Jewell Allen,* et al. (2014) 12-40954 (5th Cir. 2014) granted the request to direct the District Court to consider the victim status of the petitioners in the 2004 Act (the CVRA, below) at par [4–6]:

> As recognized by the court below, Petitioners have a right to file their own motion to be declared crime victims under the CVRA, and it is clear and indisputable that no time bar prevented the district court from considering

> the novel arguments raised by pro bono counsel in its motion below. Here, where Petitioners raise arguments not previously raised by the Government during the time the Government represented their interests, and where Petitioners have been able to retain counsel, issuance of a writ is appropriate.
>
> Accordingly, we direct the district court to consider the arguments raised by pro bono counsel below in Petitioners' motion to be afforded crime victim status under the CVRA.
>
> It is ordered that the petition for writ of mandamus pursuant to the Crime Victims' Act is granted to the extent that the district court must hear all new victim status arguments being submitted pre-sentencing by pro bono counsel.

The issues arising out of the issuance of a writ of mandamus and the role of the victim in hearings for its petitioning was again raised in the Court of Appeals for the Armed Forces in *LRM v Kastenberg* (2013) 13-5006/AF (CAAF 2013) at 15–16:

> Furthermore, while the military judge suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor 'personally [and] through counsel.' *In re Dean*, 527F.3d 391, 393 (5th Cir. 2008). The victims' 'attorneys reiterated the victims' requests' and 'supplemented their appearances at the hearing with substantial post-hearing submissions.' Id.; see also *Brandt v Gooding*, 636F.3d 124,
>
> 136-37 (4th Cir. 2011) (motions from attorneys were 'fully commensurate' with the victim's 'right to be heard.').
>
> Similarly, in United States v Saunders, at a pretrial Fed. R. Evid. 412(c)(1) hearing, 'all counsel, including the alleged victim's counsel, presented arguments.' 736F. Supp. 698, 700 (E.D. Va. 1990). In United States v Stamper, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766F. Supp. 1396, 1396 (W.D.N.C. 1991).

The US federal courts are increasingly mindful of providing the victim standing and rights of appearance before motions hearings in order to determine substantive outcomes at trial. Although standing and rights of participation do not determine an outcome in favour of the victim, with the threshold for the issuance of a writ of mandamus determined to be high, only to be issued where no other adequate means to attain relief is established, victims are nonetheless granted a capacity to participate. Unlike the charters and declarations that have emerged in England and Wales, NSW and South Australia, the right of the victim to be heard with regard to their declared rights have not been extinguished, despite rights of participation in court being subject to the leave of the court and the granting of actual relief being subject to high thresholds.

The policy limiting a victim's capacity to enforce administrative actions regards a desire to limit a victim's exposure to litigation that may well increase expectations in a deleterious way. These expectations may, and are likely to be in most circumstances, thwarted, given that most motions tend to be rejected out of preservation of the state's prerogative to administer justice. While the preservation of the victim and their protection from the unfortunate consequences of litigation may appear poignant, the denial of the victim's rights to judicial review under a charter or declaration arguably makes a farce of the rights presented. Good intentions are one thing, but illusory rights may not be the desired vehicle through which to realise them.

Notes

1. See *Maxwell v The Queen* (1996) 184 CLR 501 as to administrative remedies available to compel an executive action.

9

Victims and Substantive and Procedural Justice

Rights and Powers Dispersed

The victim of crime enjoys increased rights to justice in the twenty-first century. The relocation of the victim into legal processes and in particular the phases of the criminal trial are evidenced across a range of sources of law and policy frameworks, spanning domestic and international law, as accessed by a range of stakeholder groups. These groups include victims themselves, as well as those agents and officials of the state working with victims, including the police, prosecutors, and officials that support victims in court. Victims are also seeking advice from lawyers and criminal justice professionals independently, while accessing NGOs for continued support throughout the justice process. The way in which victims are positioned in the twenty-first century adversarial criminal trial is therefore a combination of sources of law and policy, multi-jurisdictional policy transfer, and access to a range of justice stakeholders, that demonstrate that there is no one consolidated source of law that determines the substantive and procedural character of victim involvement in the modern criminal trial (see Wemmers 2005). Rather, victims are constituted

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as trial participants across a range of sources of law and policy that are uneven, fragmented, and contradictory.

The breakdown of this book into the phases of the criminal trial attests to the fact that the victim now participates in discrete ways according to the requirements of each phase. The assumption that victims participate and have substantive rights over only limited aspects of the criminal trial needs to be dispelled and assessed in accordance with the multitude of rights referred to across each chapter. Although these rights grant the victim different levels of access to justice, and show certain powers are only exercisable by agents of the state such as the police and prosecution, the victim is nonetheless brought within the criminal trial context at each stage of proceedings. Although it is fair to say that gaps remain, in that particular phases of the criminal trial provide clearer grounding for victims' access to substantive and procedural justice while others do not, the trial taken as a whole as presented in this book goes far beyond the normative preconception that victims only participate as witnesses for the prosecution. The role of the victim in the modern adversarial criminal trial goes far beyond the assumptions reflected in normative theory that restrict the proper role of the victim to that of witness subsumed by the state's interest in crime control and as countenanced by the defendant's due process rights.

The fragmented nature of the sources of law and policies through which victims gain substantive and procedural rights in the criminal trial attest to the fact that these rights are still in development. While domestic law may develop internally, according to identified needs and gaps in local justice systems, law reform that regards the standing of victims tends to be drawn from international law and procedure in unprecedented ways. Although unprecedented, such reforms are integrated into domestic criminal procedure, such that it becomes possible to conceive of victim rights in a normative trial context (see Doak 2008). However, global rights frameworks continue to bear relevance to local practice, demonstrating a degree of internationalisation of victim rights (Hall 2010). The international law and procedure contained in Chap. 1 has thus influenced domestic law reform in various ways. International law has impacted adversarial trial processes through reforms regarding the victim's access to counsel; consultations with police and prosecutors as

to charges brought or where plea-deals are made; the reconsideration of key pre-trial decisions; increased use of restorative processes; challenging evidence in the pre-trial or trial phase; victim participation in sentencing and post-conviction, including appeal and parole; and compensation and restitution from the offender. While the actual impact of international law on domestic law and policy is evident, it is not always easily demonstrable, where international human rights norms are actioned through a range of novel or innovative policies that seek to reposition the victim in the trial. Direct connection to international norms may be less evident where reforms are initiated by way of policy transfer than direct application of precedent, or ratification of a universal instrument. Where a country is signatory to a human rights framework, for instance under the *Human Rights Act 1998* (UK), clearer connections can be established. However, where a country or the jurisdictions within a country are not signatories, then the use of international frameworks occurs by virtue of ratification of international agreement or policy transfer, instead of direct application of law (Goss 2014). The influence of international law and procedure has nevertheless influenced non-member states and jurisdictions because the fundamental character of victim rights lies beyond the national legal framework of any one jurisdiction. This permits a level of policy transfer that allows for a degree of 'experimental justice', to place the victim in proceedings in a way that does not accord with the organic development of domestic law (see Linton 2001). To put it differently, victim rights largely emerge from the deliberate insertion of those rights into existing processes. International law and procedure as regards the victim thus comes to bear on domestic law in ways that may otherwise be restricted if the victim was a normative trial participant, and subject to rules internal to a nationalised system of justice.

The integration of the victim in stages through a variable rights framework not familiar to other trial stakeholders is an important realisation of the inherent diversity of victim rights and powers. The allocation of rights across the categories of service, participatory, and enforceable or substantive rights, has assisted the staged integration of the victim in the trial process. Arguably, this staged integration has rendered victim participation in justice processes, and in substantive decision-making, more palatable to a critical legal profession (Hoyano 2015: 116–118).

While the profession remains critical of victim involvement in the trial generally (see generally, Bottoms and Roberts 2010), aspects of victim participation and access to substantive and enforceable rights are increasingly accepted in accordance with normative trial process out of the gradual integration of the victim and the recognition, in particular, that certain vulnerable victims ought to be able access special measures and protections during the trial (see generally, Bowden et al. 2014; Cossins 2009). The rights of sex offences victims to a modified criminal procedure and added protections in court or by accessing out-of-court evidence for vulnerable and cognitively impaired or child victims is increasingly accepted as a required process in a civilised justice system. Notably, other rights, such as access to counsel and standing in the trial generally, continue to be more substantially contested in the modern era.

The emergence of the victim as a trial stakeholder and participant is, however, greater than that envisaged through a realisation of the benefits of identifying the victim as a benefactor of fundamental human rights. Although the third wave of victim rights identified the victim as a subject of human rights and privileges, the modern criminal trial process has moved beyond the recognition of the victim as constituted by human rights as a matter of international policy toward a framework of rights and powers that is now institutionalising those rights and powers on the domestic and local level. Many of these rights and powers have moved beyond service level rights to provide substantive rights that may be enforced against the state and accused. The movement toward the reconfiguration of the normative arrangement of stakeholders of the criminal trial—the defendant, police, prosecution, lawyers, and the judiciary—continue to resist the inclusion of the victim as a normative trial participant and stakeholder out of adherence to the popular sentiment of the trial as a contest between the state and accused, alone. However, normative stakeholders also resist the inclusion of the victim on the basis that victims are seen to be emotional and irrational subjects wrought on revenge, whose inclusion will undermine the trial as objective and independent of the personal interests of the victim (Roach 1999b). While the characterisation of the victim as a justice stakeholder and participant is still being debated, their increased inclusion in trial processes and in substantive decisions made during the trial process already demonstrate that

victims are indeed compatible with other justice stakeholders, and that their inclusion in the justice system as a participant with standing before the courts, and with rights of consultation with other trial participants, does not spell the end of adversarial justice. Rather, this fourth phase of victim rights, the institutionalising of victim rights and powers, will necessarily lead to the reconceptualisation of the criminal trial as exclusive.

This chapter draws together the range of rights and powers discussed in this book. This chapter will assess the gravity of the changes and the way in which they demonstrate the emergence of a new criminal procedure that is more accommodating of victims. This procedure is emerging internationally with significant points of convergence between jurisdictions. Although a positive change is in contrast to earlier periods where victims were largely excluded and not taken seriously by the criminal process, this new procedure potentially comes at the cost of a system designed to protect the due process rights of the accused. This final chapter will thus complete the discussion of the polemic of increased victim rights by signalling concerns as to an evolving criminal process, in the context of the emergence of the victim as a stakeholder of justice, with identified rights to access and participate in the modern criminal trial process of their own motion.

A Criminal Trial for the Twenty-First Century

The adversarial criminal trial is increasingly constituted by rights and powers that provide the victim a degree of input or control across the phases of the trial. These rights and powers are evident from pre-trial processes once hidden from the victim, through to trial and sentencing processes. Post-conviction rights in the criminal appeal process and during parole are also increasingly inclusive of the victim. The extra-curial rights of the victim also come to bear on trial processes, with an increased willingness to legislate for processes that grant the victim the right to confer with the prosecution as to various pre-trial decisions made. Although not all rights grant victims the power to enforce the need for consultation, and that many rights continue to be in a state of development when compared to other jurisdictions that have resolved similar rights as enforceable in

court, the victim nonetheless enjoys rights that increasingly influence the progress of a criminal prosecution and trial.

Victims have had a capacity to influence pre-trial decisions for some time. Certain of these powers reside in the common law, despite long being taken over by the police or prosecutor, who now exercise them in the public interest. The power of arrest on suspicion of felony and the right to inform a court of an offence continue to be used today, despite originating in a trespass to individual rights to the person or property. Rights to be kept informed of decisions made regarding the investigation of the suspect, and to consult with police as to charges laid, provide important rights that connect victims to key processes that initiate the criminal complaint. Service level rights in the bail application process and to be kept informed of conditions imposed upon the offender with a movement toward rights of substantive participation in bail determinations in Ireland also suggest important rights determinative of this phase. The right to consult with the prosecution regarding charge determinations and plea-deals reached, with participation in such consultations required to be certified before plea-deals are accepted by the sentencing court, modifies the power dynamic where previously plea-bargaining was a private matter between state and accused with no other oversight. Access to counsel to challenge the discovery of private counselling notes in sex offences cases further demonstrates the victim's access to pre-trial processes. Victim rights in this context have led to the consideration of the need for private counsel in the pre-trial stages, but Scotland is considering extending this to the jury trial phase, in order to support child and vulnerable victims with special needs. In New South Wales, victims are expressly granted party standing in pre-trial proceedings in order to affect this challenge. Rights to review a prosecution decision to not proceed with the charge in accordance with regional human rights frameworks also demonstrates how the victim is increasingly positioned to influence pre-trial processes. The victims' right to review process, developed in accordance with internal CPS complaints processes, now standardises review rights as an access to justice mechanism for victims.

Alternative pathways to justice provide the victim further points of connection with trial processes. The availability of restorative justice and therapeutic intervention in pre-trial and post-sentencing processes

demonstrates that the victim is increasingly connected to the criminal trial and summary hearing process by virtue of the increased connection between the benefits of restorative justice and rehabilitation as a sentencing outcome. By use of the deferral, offenders are increasingly accessing programs that afford an opportunity to apologise to the victim, to make reparations, or to conference with the victim. Where done with genuine intent and sentiment, this reflects positively on the offender and is able to demonstrate contrition and rehabilitation. For young offenders, this may occur through diversion and conferencing. The complexity here is in the detailed nature of each of the restorative interventions permitted across jurisdictions. Circle and Forum Sentencing as sittings of the Local Court demonstrate how institutionalised such programs may become, where restorative intervention replaces the actual sentencing hearing, or rather, requires it to take on a form that permits direct victim participation. International law and procedure also provide evidence of the connection between restorative intervention and substantive decision-making. The movement toward problem-solving justice and the rise of the Neighbourhood Court in Victoria further demonstrates the form that restorative intervention may take, providing new opportunities to connect victims to the traditional stakeholders of justice.

The modification of the law of evidence and the reformation of trial processes to accommodate victims and vulnerable witnesses evidences the significant impact of the victim on the trial phase. Reforms to criminal procedure were largely borne out of recognition of the need to preserve the evidence of the witness to secure the conviction of the accused, which tends to be particularly important in sex offences cases where the testimony of the victim is central to establishing lack of consent to intercourse. The expansion of human rights and its impact on UK laws and processes through application of the jurisprudence of the ECtHR and the framework decisions of the EU has shaped English criminal law and procedure and required greater focus on the role of the victim in the trial process. Comparisons to continental European civil law processes, in particular those adopted in 1988 in Italy, demonstrate how the requirements of the adversarial criminal trial may be conflated with inquisitorial processes to present a hybrid model of justice. This policy transfer allows for greater reflection in the common law system as to the benefits of an inquisitorial

or hybrid process, to overcome issues of victim participation, and the preservation of the integrity of witnesses in the adversarial system, which have traditionally exposed vulnerable victims and witnesses to harsh examination in court. Summary processes in the Local Court are also providing important adjuncts to the jury trial to provide alternative mechanisms for securing the autonomy and integrity of the victim in light of immediate threats and intimidation.

The sentencing process has long been the phase of the criminal trial subject to law reform initiatives allowing for greater victim participation. Courts have been able to consider the content of VIS for non-fatal offences and have a significant record of including a VIS as evidence for the impact of sex offending, where harms to the victim are ongoing, may increase over time, and are otherwise unlikely to be introduced during trial. Reforms to NSW law in 2014 now allow for the consideration of VIS in homicide cases. Reforms across various common law jurisdictions now provide for the consideration of a CIS, and courts are increasingly receptive to submissions from community representatives that help phrase the objective seriousness of the offence in a meaningful way that contributes to the court's understanding of the need to denounce and deter the offender or like offenders. Importantly, as demonstrated in Chap. 3, the sentencing phase provides an opportunity to connect to processes of restorative intervention and to utilise the outcomes of these processes to mitigate the seriousness of the accused's character and capacity for rehabilitation.

The post-conviction appeals phase has been long neglected as one that is of interest to the victim. Increasingly, however, the victim is being afforded rights that permit them to consult with the prosecution with regard to the need to appeal a decision. Supplementary rights to services or access to court processes also increasingly place the victim in the appeals phase of the trial. Rights to tender a new VIS are not universal but increasingly debated as options of law reform. The rise of registers of victim interests are also important adjuncts granting victims service level rights in the post-conviction phase. Mediation as a restorative justice option in prison demonstrates the reach of restorative intervention across the criminal process. Mediation demonstrates how victims are able to connect with the prisoner to seek information with a possible view to

understanding the harm that has been occasioned to them. Recidivist offenders and the revival of preventative detention also provide a controversial new role for the victim in preventative detention hearings. The recent focus on weaknesses in the parole process and the questioning of the assumption of the right to release at the completion of the minimum term now positions victims in a new way with regard to parole hearings. Submissions from victims, at least in Victoria following the 2013 reforms, are now considered important and central to the final decision to be made by the Parole Board.

The transition of criminal injuries compensation to a victim focused scheme that provides for their welfare is again under consideration. Compensation schemes in the UK and NSW have been revised to affect various policy considerations that restrict victims' access to compensation and direct the victim to alternative sources of assistance. Although the UK and NSW schemes do this in different ways, with different thresholds and tests, and where access to services and assistance is retained within the NSW scheme, the result is the reduction in lump sum payments and the preservation of payments for deserving victims who demonstrate an innocent, deserving character. While compensation has developed and largely remains as outside the criminal trial, sentencing courts retain the power to make a compensation order in their civil jurisdiction. Policies of holding the offender to account are also realised through compensation schemes through victim restitution and reparation. Increased connection between proportional sentencing, compensation and victim restitution, although not commensurate across all jurisdictions, further demonstrates the connectedness of victims' compensation arrangements and the broader criminal trial process. Reparations in the ICC also show how compensation mechanisms are vital to the participation of the victim and how this procedure brings the victim within justice processes.

The application of extra-curial rights and processes has been instrumental to the placement of the victim back into the modern criminal justice system. Whether this be by adopting the 1985 PJVC in whole or part, victims have been granted some standing by virtue of the rights afforded by charters and declarations at the local level. Although most local charters or declarations only provided service level rights in their initial form, such instruments helped confound the realisation that vic-

tims could be the subject of rights. Further, such declarations helped make a persuasive case that victims ought to be placed within the criminal justice system, as opposed to extraneous institutions, such as compensation tribunals that remove the victim from the processes of criminal law for an administrative milieu. Over time, these charters and declarations have proven to be the ideal means through which to better realise the expansion of victim rights with a view, evidenced through the conversion of victim rights under the USC, to the rise of enforceable rights for victims. The rise of the Office of Commissioner of Victims' Rights is also an important adjunctive development that supplements the power of the victim in the criminal trial.

The Fourth Phase of Victim Rights

The significance of international law and procedure and human rights discourse on the evolution of victim rights and powers on the domestic level cannot be underestimated. Not all jurisdictions are signatories to every instrument, and ratification of a declaration may not mean that the powers declared instantly transform into enforceable rights that impact all processes within a jurisdiction. However, increased awareness of the victim in the context of a willingness to consider the policies of alternative, like jurisdictions, has resulted in the transfer of ideas and approaches to better position the victim in the twenty-first century (see McFarlane and Canton 2014; Dolowitz and Marsh 2002). This trend continues and arguably has increased momentum as we moved toward the middle of the second decade of the twenty-first century.

The result of the increased awareness of the needs of the victim, and the identification of the victim as a rights-bearing subject in particular, provides a substantial basis for policy and legal reform. The availability of various approaches that support the provision of victim rights as found across justice systems internationally, including human rights frameworks and the continental European approaches, allow for the institutionalisation of rights and powers in the present through processes of law reform and policy transfer. The fourth phase of victim rights thus moves beyond the assumption of the third phase, that the victim is indeed a person owed

fundamental human rights, for the realisation that we need to articulate those rights in a framework compatible with existing laws and processes on the local level (cf. Sebba 1996; van Dijk 1988). The fourth phase is thus commensurate with the institutionalising of those rights and powers on the operational level of criminal justice processes. This operationalising takes the form of connecting victim rights and powers with professional roles, and the institutional capacity of other justice stakeholders, such that the rights of the victim become interconnected to the functioning of the various offices of the agents of the criminal justice system. This necessarily occurs in the particular, and is evidenced by micro-instances of law reform as relevant to the exercise of each office. This is not to say that victims become equal to other trial stakeholders, or that they are able to control proceedings. Rather, the victim has an identifiable and acknowledged role in trial processes as a participant relevant to procedural justice and relevant substantive determinations as exercisable by existing justice stakeholders (Elias 1985; van Dijk 2009).

Looking forward, the fourth phase may not be fully realised until victim rights become at least partially connected to the powers exercisable by the offices of criminal justice that presently shape the criminal trial. This connection may take the form that the proper functioning of those offices cannot occur without consultation of the rights and powers of the victim. The connection between the rights of the victim and the other agents of criminal justice converge at the point where the victim can be identified as exercising some substantive agency over decisions made within the criminal trial. By connecting to other stakeholders of justice, therefore, victims can be identified as substantially constitutive of the adversarial criminal trial in its present form. This does not mean that victims are the central agent of justice in the adversarial criminal trial. Rather, the modern criminal trial takes its form through a power-sharing arrangement between stakeholders, and although the offender and state remain primary under a due process model of justice, the victim may be increasingly present with a capacity to shape the contours of this power relationship. Counsel participating in pre-trial and trial stages of proceedings on behalf of victims, for instance, do not necessarily do so as equal to the prosecution and state. While the role of the victim is significant, participation is constituted through particular processes and powers that

grant the victim limited standing to challenge evidence or to seek assistance, through an expanded agency model. Unlike the prosecution and accused, who enjoy a range of rights and powers that canvass procedural and substantive trial rights in a general sense, victim rights are deployed in the particular. While the number of powers and right identified as relevant to the victim have increased over time, these are still identified in the context of the discrete need to access justice, and do not provide for plenary control of the criminal process.

As demonstrated through the various phases of the trial covered in this book, however, the victim is no longer peripheral, an outsider who is only brought into the trial context as a witness. The victim is able to make decisions and exercise powers, at times through other stakeholders such as the police or prosecution, which impact directly on the scope, form, and content of the trial process. Although victim rights are today generally more expansive as compared to any point in the recent history of such rights, it is the recent trend to at least partially institutionalise the victim into the apparatus of the criminal trial and the institutional framework of offices and agents that constitute it, which evidences a movement toward a fourth phase of victim rights.

Enforceable Victim Rights

The central argument contended by this book considers the gradual movement toward substantive and enforceable victim rights. Although victims continue to enjoy service and procedural rights that may not be enforced against the state or accused, the trend is toward rights that provide victims with some capacity to insist upon a substantive outcome. However, this outcome may be realised through a range of mechanisms and may not always be in the victim's favour. This raises two important issues: the consequences of the fragmented and incoherent nature of the development of enforceable rights on an international and domestic basis, and the exposure of the victim to decision-making, potentially litigious processes, which hold no guarantee of a favourable outcome, or even therapeutic intervention in favour of the victim. Arguably, victims are increasingly subject to a minefield of rules, determinations, and

processes, drawing on different sources and discourses of law, and where few outcomes are known in advance, should the victim choose to press their rights by challenging decisions made.

The law traced in this book demonstrates that the movement of victims toward enforceable and substantive rights is occurring in a fragmented way. This fragmentation is largely the result of the existence of normative criminal processes that cannot be easily modified to accommodate the victim, who has never been afforded a significant role in modern systems of adversarial justice. As such, the integration of victims, especially where victim rights are enforceable and determinative against the state and accused, must work around existing powers that grant the accused a fair trial and the state the power to administer the criminal justice process. Enforceable rights can be grouped according to the phases of the criminal trial, and most are developed in response to discrete concerns for victim rights and interests as they become relevant during the different phases of the criminal trial process. For example, processes surrounding the law of evidence may be modified out of need to secure the testimony of a victim of sexual violence. Victim rights are also fragmented by reason of the jurisprudence from which they draw. Victim rights may be informed by local needs and politics, but the advent of human rights frameworks, most notably the 1985 PJVC and the implementation of EU directives and the ECHR, has fostered the consideration of victim rights as human rights. This reasoning has increasingly influenced domestic law by statutory reform or by, where permitted, the consideration of human rights decisions in common law courts. This process of the slow inclusion of discourses of human rights as a basis for procedural and substantive legal change has accentuated the uneven and fragmented integration of victim interests, and explains how different jurisdictions have worked in different ways, and with different levels of urgency, to modify statutory and common law processes that otherwise afforded the victim few rights and privileges.

The raising of the standing of victim rights to enforceable rights comes with real consequences for victims. Service and procedural rights grant the victim some degree of standing without the requirement to convince the court of a substantive position—and then to potentially suffer the consequences of an adverse decision. However, confining the victim to service and procedural rights—to promote participation without sub-

stantive impact or consequence but perhaps to allow for a therapeutic intervention or justice experience—is to arguably invite victims to participate in way that fundamentally undermines their capacity as an actual participant and stakeholder of justice. Not only are lawyers and judicial officers uncomfortable with the idea of accommodating victim participation to enhance the chances of a therapeutic outcome in order to satisfy victim disquiet and the political imperative that supports it, it exposes courts and the criminal process to alternative discourses of intervention for which they may not be suited. Arguably, courts are not ideal places of therapy. This is not to say that victim participation should not be therapeutic. However, therapeutic intervention as a justification for victim involvement ought to be a secondary consideration behind the actual business of the criminal process—determinations of wrongdoing. Therapeutic intervention for victims will arguably result from the integration of victims as holders of rights, especially enforceable rights that provide for a degree of substantive participation. Courts and the people who participate in them will need to take victims seriously because they possess rights that may impact on the substantive decisions made. The assumption here is that being taken seriously as a valid stakeholder is foundational, which ultimately supports modes of participation that transform the justice process into one that affords the victim enhanced standing, with a view to substantive and thus therapeutic intervention.

This book has demonstrated the rise of enforceable victim rights out of a history of service and procedural rights. Other participants in the criminal process—lawyers, judicial officers, prosecutors, police, and court staff—will take victims more seriously and potentially as equal participants once they know that they hold rights that will have a real impact on the outcomes to be determined. Arguably, this provides the best chance for a therapeutic intervention, but only as long as victims are aware that enforceable rights bring the potential of disappointment. Like offenders, who risk adverse decisions based on the submissions they make at trial, victims will need to understand that participation as a holder of enforceable rights will not always result in the desired outcome and that some decisions will be adverse. Although the issue of impact of enforceable rights on therapeutic justice requires further research and consideration,

victim support networks will have an essential role ameliorating harms from adverse enforceable decisions on rights because such networks are already very good at managing victim expectations in a system that ill affords victims opportunities for real participation. Victim support, including access to support people, counselling, and compensation, will continue to maintain victim needs even where an application for enforceable rights fails.

Victims, Criminal Procedure and the Criminal Trial

The rights and powers of the victim increased significantly in the latter part of the twentieth century, and this trend has continued into the twenty-first century. While many powers exercisable by the victim have been present at common law, such as arrest and private prosecution, others have been granted out of necessity, such as protected of vulnerable witness status, in order to ensure that the trial proceeds on the testimony of the victim. Added to this are international human rights standards and policies that have now been ratified at the local level to allow access to information and justice professionals in order to better inform the victim and to provide some sense of inclusion in decision-making processes.

The broader recognition of the institutionalising of victim rights and powers indicates that we have entered a fourth phase of victim rights in the modern era. However, this fourth phase is characterised by rights and powers that are inherently diverse, spanning numerous sources of law and policy, while following a discourse and lexicon of rights that provide different powers and thus access to different levels of justice. This book has adopted the terms service, procedural and enforceable or substantive rights to demonstrate that victims possess differential rights and powers that define their relationship with other trial stakeholders in different ways, at different stages of the criminal trial process. This means that although we are indeed bearing witness to the increased institutionalising of victim rights and powers, these rights and powers have modified the adversarial criminal trial in different and inconsistent ways. Taken

collectively, these changes have modified our shared understanding of the modern trial from an exclusive contest between normatively positioned and empowered stakeholders that largely exclude the victim. However, the fragmented and incoherent nature of victim rights, and the identification of certain rights as illusory, allows us to ignore these rights as not central to nor constitutive of trial rights. This confounds resistance to the broader recognition of victim rights as constitutive of the modern adversarial criminal trial. Despite the clear impact of victim rights on the criminal trial as an institutional apparatus, the diversity of rights, and the various discourses from which they draw, allows for the continued identification of the victim as peripheral or even deleterious, to the objects of the criminal trial in the modern era.

However, incrementally, victim rights and powers are being recognised as impacting on the criminal trial, and this trend has continued into the twenty-first century such that victim rights are increasingly identified in a normative context, potentially as a coherent set of rights and powers, which afford victim's standing alongside other trial stakeholders. The identification of the rights of victims as fitting a coherent framework of rights will require, however, the continued interrogation and development of those rights, such that service and procedural rights will continue to transform to be made consistent with new enforceable rights and powers. Such rights—service, procedural, and enforceable rights—may increasingly emerge under a consolidating instrument, where desirable, or at least become available in a collected and organised form. Although victims are increasingly acknowledged as trial participants in this modern era, this participation ought to occur through instruments that organise victim rights as patently relevant to the phases of the criminal trial, albeit victims may still not necessarily always appear as equal to other trial participants. The role of the victim in any given proceeding will vary, depending on the desire of the victim to participate, the substantive elements of the charge brought, the weight of evidence that founds the accusation of wrongdoing, and the need for the victim to personally testify in court. Although the role of the victim may not be equal to other participants, and that it may indeed be desirable that victims are not identified as primary partici-

pants alongside the state or offender, their role as a constitutive element of the criminal trial process should not be denied. Rather, the victim should be increasingly identified as a constitutive agent of the adversarial criminal trial, and of the genesis and development of a modern criminal procedure generally.

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